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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the language of the Uncompahgre Act of August 15, 1894, implemented by the the Act of June 7, 1897, and the Uintah Act of May 27, 1902, as amended, providing that the unallotted lands of these original Indian reservations shall be restored to the public domain, constituted clear language of disestablishment, as this Court has recognized, or whether the original reservation boundaries continue to exist because this Court's decision in *Solem v. Bartlett* changed the effect of such language, as the *en banc* majority of the court below held.

2. Whether the original Uncompahgre reservation was disestablished in light of the express statutory language and the facts that the United States has not treated the disputed area as a reservation since 1897, that in 1965 the Tribe recovered damages from the United States on the basis that the Uncompahgre reservation no longer existed, and that the population and land use in the disputed area are more than ninety percent non-Indian.

3. Whether the original Uintah reservation was disestablished in light of the express statutory language and the facts that the United States did not administer the disputed area as a reservation for more than sixty years after the date of opening, that contemporaneous Presidential, Congressional and administrative treatment of the area showed that it was no longer considered a reservation, that more than half of the original reservation was made into a national forest and that the population and land use in the remaining area are more than ninety percent non-Indian.

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The opinion of the district court is reported at 521 F. Supp. 1072 (Pet. App. 112a). The decision of a panel of the court of appeals is reported at 716 F.2d 1298 (Pet. App. 64a). The decision of the court of appeals sitting *en banc* is reported at 773 F.2d 1087 (Pet. App. 1a).

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* was entered September 17, 1985 (Pet. App. 370a-371a). On January 6, 1986, the court of appeals denied a timely petition for rehearing (Pet. App. 63a). On March 26, 1986, Justice White extended the time for filing a petition for a writ of certiorari to and including May 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes and presidential proclamations are set forth in an appendix to the opinion of the district court, which is reprinted at Pet. App 292a-364a. The Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-338, is reprinted at Pet. App. 311a. The Act of June 7, 1897 (30 Stat. 62, 87) is reprinted at Pet. App. 313a. The Act of May 27, 1902, as amended (32 Stat. 245, 263), is reprinted at Pet. App. 315a. The Act of May 24, 1888 (25 Stat. 157) is reprinted at Pet. App. 309a. The Act of March 3, 1903 (32 Stat. 982, 997-998), is reprinted at Pet. App. 319a. The Joint Resolution of June 19, 1902 (32 Stat. 744) is reprinted at Pet. App. 317a. The Act of April 21, 1904 (33 Stat. 189) is reprinted at Pet. App. 322a. The Act of March 3, 1905 (33 Stat. 1048, 1069-70) is reprinted at Pet. App. 322a.

STATEMENT

The Ute Indian Tribe is a federally-recognized Indian tribe comprised of the Uintah, White River and Uncompahgre Bands (Pet. App. 114a, 152a). There are today approximately 1,500 enrolled members of the Tribe, nearly all of whom live on trust lands in the Uintah Basin of northeastern Utah (Pet. App. 38a). The dispute in this case concerns not those lands or additional trust lands, which comprise about a million acres, but the surrounding area of 3 million acres, which had been set aside during the 1800's as the Uintah and Uncompahgre reservations (*id.* 38a). Nearly all of this disputed area lies within Duchesne and Uintah Counties. On the 4 million acres within the boundaries of the original reservations the total non-Indian population is about 18,000.[1] In 1975, the Tribe enacted a Law and Order Code asserting jurisdiction over the entire 4 million acre region on the basis that the area continued to retain reservation status despite turn-of-the-century legislation restoring the area to the public domain and despite the fact that at least in regard to one portion of the region—the original Uncompahgre reservation—no agency of the federal government has treated it as an Indian reservation since 1897. See note 22 *infra*.

The original Uncompahgre reservation, created by Executive Order of January 5, 1882 (I Kappler 901), encompassed more than 1.9 million acres, nearly all of which is in Uintah County.[2] In the Act of August 15, 1894, ch.20, 28 Stat. 286, 337-338, Congress directed that when a Pres-

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[1] U. S. Dep't of Commerce, Bureau of Census, *General Population Characteristics Utah*, Table 15 p.46-12 (1980). Copies of Intervenor's Exhibit 1-B, a map showing the original reservation boundaries and trust lands, have been lodged with the Clerk of this Court.

[2] *See, e.g.*, [1892] Commissioner of Indian Aff. Rept., at 908 (JX 27) [1911] Commissioner of Indian Aff. Rept., at 92 (JX 353). ("JX" refers to the Joint Exhibits at trial.)

idential commission determined which lands would remain after allotments to the Uncompahgre Indians, those unallotted lands "shall, by proclamation, be restored to the public domain. . . ." Three years later, pursuant to the Act of June 7, 1897 (30 Stat. 62, 87), implementing the 1894 Act, approximately 12,500 acres within this area (or less than 1 percent of the original Uncompahgre Reservation) were allotted, while the remaining lands were thereafter treated as "restored to the public domain,"[3] as the Commissioner of Indian Affairs stated.

The original Uintah reservation, which had been created in the 1860's, consisted of more than two million acres, most of which is located in Duchesne County.[4] Pursuant to the Act of May 27, 1902 (32 Stat. 245, 263), as amended, a Presidential Proclamation of July 14, 1905 (34 Stat. 3119), provided that all the unallotted and unreserved lands of the original Uintah reservation were restored to the public domain and opened for public settlement under the homestead and townsite laws.[5] The following exceptions were made from this Proclamation: (1) the Secretary of the Interior set aside approximately 250,000 acres as a grazing reserve for the Ute Indians pursuant to the Joint

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[3] *E.g.*, [1899] Commissioner of Indian Aff. Rept. at 543 (JX 117); [1911] Commissioner of Indian Aff. Rept. at 92 (JX 353). The reservation was merely a temporary executive order reserve from which allotments were to be made. The Uncompahgre Utes' ancestral home was originally in Colorado. See Pet. App. 22a & n.7 (Seymour, J., concurring). *See generally Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942).

[4] *See* Executive Order of Oct.3, 1861 (I Kappler 900); Act of May 5, 1864 (13 Stat. 63); [1879] Commissioner of Indian Aff. Rept., at 331 (JX 3). The western-most part of the original reservation is located in Wasatch County and the eastern-most part is located in Uintah County.

[5] *See, e.g., Uintah and White River Bands of Ute Indians v. United States*, 139 Ct.Cl. 1, 22 (1957); *Hanson v. United States*, 153 F.2d 162, 162-63 (10th Cir. 1946).

Resolution of June 19, 1902 (32 Stat. 744);[6] (2) more than one million acres were added to the Uintah National Forest (34 Stat. 3116); and (3) some 56,000 acres were reserved for reservoir sites for Indians and general agricultural development under the Presidential Proclamation of August 3, 1905 (34 Stat. 3141, *as modified,* 34 Stat. 3143).[7] Of the balance, approximately 99,000 acres were allotted to individual Indians[8] and another 7,000 acres—the "Gilsonite Strip"—had already been restored to the public domain in 1888.[9]

After 1905 and for the next forty years, the tribal reserves, together with the allotted lands in the original Uncompahgre and Uintah reservations, were treated as the Ute Indians' existing reservation.[10] On August 25, 1945, however, a 217,000 acre tract of opened and undisposed of land located within what had been part of the original Uintah Reservation was, by Proclamation of the Secretary of the Interior (10 Fed. Reg. 12409), restored to tribal ownership and "added to and made a part of the existing reservation" pursuant to Sections 3 and 7 of the 1934 Indian Reorganization Act (48 Stat. 984). Later, the Act

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[6] More than 20,000 acres were also set aside by the Department of the Interior as a tribal timber reserve for the Ute Indians. *See, e.g.,* Memorandum of Chief Supervisor of Forests, dated March 20, 1922, at 1 (JX 401). *See also* 1932 Annual Report of the Uintah and Ouray Agency, at 1 (JX 427).

[7] In the Act of April 4, 1910 (36 Stat. 269, 285), Congress provided compensation and thereby extinguished all of the Ute Indians' right, title and interest to these reclamation lands. The Utes were also ultimately compensated for the lands opened to settlement and the National Forest withdrawals. *See e.g., Uintah and White River Bands of Ute Indians,* 139 Ct.Cl. at 6-7, 11.

[8] *See, e.g.,* [1911] Commissioner of Indian Aff. Rept., at 91 (JX 353).

[9] Act of May 24, 1888 (25 Stat. 157).

[10] *See e.g.,* Pet. App. 39a (Seth, J., dissenting); S. Doc. No. 78, 66th Cong., 1st Sess., at 1 (1919) (letter of the Secretary of Interior). *See* note 13 *infra.*

of March 11, 1948 (62 Stat. 72), added an additional 500,000 acres—the so-called Hill Creek Extension—to the Ute Indians' reservation.[11]

There is no dispute that the tribal reserves together with the remaining allotments—some 360,000 acres—are "Indian country" within the meaning of 18 U.S.C. § 1151(a) and (c). Nor does anyone question that the surplus lands restored to tribal ownership and reservation status in 1945 and in 1948 (the Hill Creek Extension)— which total more than 700,000 acres—are also Indian country. This entire area, comprising more than one million acres,[12] had been considered the extent of the Tribe's existing reservation until recent years (*see, e.g.*, Pet. App. 39a (Seth, J., dissenting)).[13]

As to the remaining portions of the two original reservations, where Congress ended Indian ownership long ago, the area has historically been the primary concern of the State and other governments. The population and land use of these disputed 3 million acres are more than 90 percent non-Indian and, as indicated above, nearly all the enrolled members of the Tribe live elsewhere.[14] Pet. App. 38a (Seth,

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[11] A substantial portion of the Hill Creek Extension included lands located within the original Uncompahgre reservation. *See, e.g.*, Pet. App. 186a.

[12] As a practical matter, checkerboarding has not been a concern. The trust lands are roughly contiguous and not widely interspersed with non-Indian owned lands.

[13] It is anticipated that the Tribe will contest that only these lands were originally treated as its reservation. As the dissent concluded, however, the record establishes otherwise (*see* Pet. App. 39a), a point the *en banc* majority did not dispute.

[14] The tribal governmental unit is also located on the undisputed trust lands. The present governing body of the Ute Indian Tribe is a six member Tribal Business Committee. Two representatives of each of the three Ute Bands, the White River, the Uintah and the Uncompahgre, are elected to this Committee. In the most recent tribal election, in 1985, a total of 430 votes were cast for all candidates. *Uintah Basin Standard*, p. 20, April 17, 1985.

J., dissenting). Within the disputed area there are a substantial number of incorporated towns and cities (such as Roosevelt and Duchesne), and in recent years there has been significant natural resource, business and recreational development.

In 1975, however, after enacting its Law and Order Code, the Ute Indian Tribe sued Duchesne County and the Cities of Roosevelt and Duchesne,[15] claiming that the original Uintah and Uncompahgre Indian reservations, the combined area of which exceeds four million acres, presently exist to the full extent of their historic boundaries. After six years of litigation, the district court rendered an opinion holding that the original Uncompahgre reservation had been disestablished by the Act of June 7, 1897 (30 Stat. 62, 87). Pet. App. 190a. The court further held that the original Uintah reservation had been diminished through: (1) the withdrawal of the so-called "Gilsonite Strip" pursuant to Act of May 24, 1888 (25 Stat. 157); (2) the withdrawal of approximately one million acres for inclusion in the Uintah National Forest pursuant to the Act of March 3, 1905 (33 Stat. 1048, 1070); and (3) the withdrawal of approximately 56,000 acres of land for the Strawberry Reclamation Project by the Act of April 4, 1910 (36 Stat. 269, 285). Pet. App. 284a. The court also recognized, as had the parties, that the Tribe's reservation had been enlarged to include the 500,000 acre tract known as the "Hill Creek Extension" under the Act of March 11, 1948 (62 Stat. 72). Pet. App. 187a.

On appeal, a panel of the Tenth Circuit unanimously affirmed the lower court's decisions that: (1) the original Uncompahgre reservation had been disestablished; (2) the original Uintah reservation had been diminished by the withdrawal of the "Gilsonite Strip" and the land for the Strawberry River Irrigation project; and (3) the Tribe's

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[15] The State of Utah subsequently intervened as a party defendant in 1976 and Uintah County, Utah was joined as a defendant in 1979.

reservation was later expanded by the Hill Creek Extension. Pet. App. 75a-96a. By a divided vote, the panel also affirmed the district court's holding that the original Uintah reservation had been diminished by the National Forest withdrawal. Pet. App. 93a-95a. Reversing the lower court's decision, the panel held that reservation status had ended with respect to lands within the original Uintah reservation opened for settlement pursuant to the Act of May 27, 1902, *as amended* (32 Stat. 245, 263). Pet. App. 93a.

The Tribe petitioned for rehearing solely in regard to the status of the former Uintah reservation lands opened pursuant to the 1902 Act. After this Court's decision in *Solem v. Bartlett,* 465 U.S. 463 (1984), the court of appeals granted rehearing *en banc.* The Tribe then filed an amended petition to include the status of the original Uncompahgre reservation and the National Forest withdrawal from the original Uintah reservation.

The *en banc* court, with two judges dissenting, disagreed with the decision of the panel and, invoking *Solem,* held that both the original Uncompahgre and Uintah Reservations still exist undiminished (except for the 1888 Gilsonite and 1910 Strawberry Reclamation Project withdrawals).[16] The *en banc* majority thus reversed the principal aspects of the district court's decision, which the panel had affirmed, including the lower court's holding that the original Uncompahgre reservation had been disestablished.[17]

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[16] Judge Seymour, joined by three other Circuit Judges, wrote a concurring opinion amplifying the court's holding respecting the National Forest withdrawals and the Uncompahgre reservation (Pet. App. 14a-29a).

[17] Judge Doyle, who wrote the *en banc* majority's opinion, was a member of the panel which first heard the case and joined in the panel's decision that the Uncompahgre reservation had been disestablished.

The United States participated as *amicus curiae* in the district court and in the court of appeals. Although it supported the Tribe with respect to the status of the original Uintah reservation, it took no position regarding the original Uncompahgre reservation. While the case was pending in the district court, however, the Solicitor General informed this Court that since 1897 the federal government had considered the original Uncompahgre reservation to have been disestablished and that "the historic evidence compels the conclusion that the Uncompahgre Reservation no longer subsists. . . ."[18]

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

This is a case of great importance to the State of Utah, to the counties and cities affected and to the people living there. In deciding that the original Uncompahgre and Uintah reservations continue to exist, the *en banc* majority mistakenly believed that this Court's 1984 decision in *Solem v. Bartlett, supra,* rendered after the panel's decision, changed the law in reservation boundary cases. Relying on what it deemed the *"Solem* standards," it fashioned the second largest Indian reservation in the United States.[19] The *en banc* majority did so although for more than half a century the lands "constituting" the Tribe's reservation were considered to be only those lands held in trust by

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[18] Memorandum for the Petitioner in Response to the Motion of the Ute Indian Tribe, at 6, *Andrus v. Utah,* 446 U.S. 500 (1980) (No.78-1522) (September 25, 1979) [hereinafter Federal Government Memorandum in *Andrus v. Utah,* relevant portions of which are reprinted at Pet. App. 366a.]

[19] The largest is the Navajo Reservation. *See* U.S. Department of Commerce, *Federal and State Indian Reservations* 63 (1974). With some three million acres of non-Indian owned lands included within its boundaries, the Uintah and Ouray Reservation, would under the decision below, contain the largest concentration of such lands of any recognized reservation. *See, e.g., Federal and State Indian Reservations, supra.*

the federal government, as this Court itself recognized in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 141 (1972), in a different context.[20] As to part of the region—the original Uncompahgre reservation—the court below contradicted the federal government's position, taken in this Court, that the reservation ended in 1897, and has not been treated as an Indian reservation by the Department of the Interior or any other federal agency since then.[21] Indeed, the Uncompahgre Utes, alleging that they had "lost the reservation," recovered money damages against the United States, as the government told this Court.[22] As to the entire region, the population

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[20] Indeed, it was not until enactment of its comprehensive Law and Order Code in 1975 that the Ute Tribe itself first took the position that the original Uncompahgre reservation continued to exist. *See, e.g.*, Pet. App. 30a, 39a. (Seth, J., dissenting); 1957 Ute Tribe Ten-Year Development Program, at 66-68 (JX465); 1966 Review and Revision of the Uintah and Ouray Indian Reservation-Wide Program, at 7-10. The administrative treatment of the disputed portions of the Uintah Reservation has followed a similar course. Thus, prior to the present dispute, only the trust lands were considered to be the Tribe's existing reservation. See, *e.g.*, Pet. App. 39a. (Seth, J., dissenting); S. Doc. No. 78, 66th Cong., 1st Sess., at 1 (1919) (Letter of the Sec. of Interior); 1957 Ute Tribe Ten-Year Development Program, at 66-68 (JX 465).

[21] By contrast, in all five of this Court's disestablishment decisions the United States had contended that reservation status had not ended. See *Solem*, 465 U.S. at 464; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 426 (1975); *Mattz v. Arnett*, 412 U.S. 481, 482 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 352 (1962).

[22] See Petition, at p.7, in *Ute Indian Tribe v. United States*, 14 Ind. Cl. Comm. 707 (1965). In *Andrus v. Utah*, 446 U.S. 500 (1980), the Ute Tribe had moved to intervene on the basis that the lands involved were within the original Uncompahgre reservation and that this reservation had not been disestablished. The Solicitor General opposed the Tribe's intervention on the basis that:

> The fact is that, for several decades at least, the Department

is 90 percent non-Indian and 3 million acres of the territory encompassed within the decision below are non-Indian owned.

The 18,000 inhabitants[23] of the Uintah Basin area thus face the prospect of being suddenly thrust into the status of residents of an Indian reservation, where their officials would have only limited jurisdiction and where they would have no elective voice in the governance of their affairs and property by the Tribe. For its part, the Ute Tribe has already enacted a comprehensive Law and Order Code which, by its terms, is applicable to Indians and non-Indians alike throughout both historic reservation areas (Pet. App. 30a). Although the Tribe would not have the criminal jurisdiction they claimed over non-Indians (*see Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978)), the same

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of the Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. . . .

Federal Government Memorandum in *Andrus v. Utah,* note 18 *supra,* at 6. Among other factors, the Solicitor General pointed out that "Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name," "in 1965, the Ute Tribe obtained a stipulated judgment in the Indian Claims Commission to compensate it for the failure of the United States to provide the Uncompahgre Band with a permanent Reservation (*Ute Indian Tribe of the Uintah and Ouray Reservation v. United States,* 14 Ind. Cl. Comm. 707)," and "at no time since 1897 does it appear that the Department of the Interior (or any other government agency) has treated the Reservation as still in existence." *Id.* at 4-5. The relevant portion of the Memorandum is reprinted in the Appendix to this Petition. Pet. App. 366a.

[23] The combined population of Duchesne and Uintah Counties is currently estimated to be 39,000; at least 18,000 non-Indians live within the historic reservation boundaries. On the other hand, the present number of enrolled members of the Tribe is estimated to be 1,500. Pet. App. 38a; Bureau of Econ.& Bus. Research Report, Univ. of Utah, Vol.45, No.1, p.8, Table 5, July 1, 1984 (1985).

cannot be said with respect to civil jurisdiction.[24] The Tribe's Code also has a comprehensive Exclusion and Removal section, which purports to be applicable to both Indians and non-Indians throughout the two original reservations in certain situations.

While the case is therefore of profound importance to the people of Utah, it has great significance beyond the affected areas. At the heart of the controversy is the restoration to the public domain language in the 1894 Act (Uncompahgre) and the 1902 Act (Uintah). During the late 1800's and early 1900's, Congress[25] and the President[26]

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[24] *National Farmers Union v. Crow Tribe*, ___ U.S. ___, 105 S.Ct. 2447 (1985). In 1981, this Court noted that Indian tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, *even on non-Indian fee lands*. . . ." *Montana v. United States*, 450 U.S. 544, 565 (1981) (emphasis added). The lower courts, construing tribal authority on reservation fee lands, have stated that such authority includes the power of taxation as well as some land use and related regulation. *See, e.g., Snow v. Quinault Indian Tribe*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, ___U.S. ___(1984); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

[25] *See, e.g.*, 17 Stat. 633 (Round Valley); 23 Stat. 80 (Columbia); 25 Stat. 157, § 1 (Uintah); 25 Stat. 896, 21 (Great Sioux Nation); 27 Stat. 63 (Colville); 27 Stat. 467 (White Mountain Apache); 27 Stat. 642, 10 (Cherokee Outlet); 28 Stat. 678, 4 (Southern Utes); 35 Stat. 457, 25 (Navajo).

[26] *See, e.g.*, Exec. Order of July 2, 1872, I Kappler 916 (Colville); Exec. Order of August 5, 1873, I Kappler 813 (White Mountain Apache); Exec. Order of December 21, 1875, I Kappler 874 (Hot Springs); Exec. Order of August 3, 1878, I Kappler 831 (Tulee River); Exec. Order of August 9, 1879, I Kappler 899 (Sioux); Exec. Orders of July 13, 1880, I Kappler 856, 883 & 896 (Blackfeet, Fort Berthold and Yanktonais); Exec. Order of August 4, 1882, I Kappler 834-35 (Ute); Exec. Order of March 20, 1884, I Kappler 884-85 (Great Sioux Nation); Exec. Order

frequently used such language to open Indian reservations for entry and settlement. Until the decision in this case, such restoration-to-the-public-domain language meant that the reservation was disestablished, a point well understood by this Court, by Congress, by the President, by the Department of the Interior and by the Department of Justice.

The *en banc* majority, however, mistakenly believed that this Court's decision in *Solem* "dictates a different result," despite the fact that in *Solem* the Court indicated that it was following a path clearly marked by its prior decisions. (Pet. App. 17a). Only this Court can correct the *en banc* majority's misreading of *Solem*, a misreading that not only would result in transforming a vast region of the State of Utah into an Indian reservation, but also would threaten to have a similar effect throughout the Western States in other areas that are not now considered to be Indian reservations. Already the Navajo Tribe of Indians, armed with the decision below, claims that 1.9 million acres in New Mexico, which were "restored to the public domain" in the early 1900's, are nevertheless part of an Indian reservation because the *en banc* majority's decision here renders "unsound" the view that such language ends reservation status.[27]

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of May 15, 1884, I Kappler 875 (Jicarilla Apache); Exec. Order of June 3, 1884, I Kappler 885 (Turtle Mountain); Exec. Order of January 29, 1887, I Kappler 824 (Mission Indians); Exec. Order of March 2, 1889, I Kappler 890 (Malheur); Exec. Order of December 22, 1902, III Kappler 671 (San Carlos); Exec. Order of January 25, 1904 III Kappler 681 (Sioux); Exec. Order of May 15, 1905, III Kappler 675 (Capitan Grande Band); Exec. Order of June 17, 1909, III Kappler 668 (Papago Indians); Exec. Order of November 11, 1909, III Kappler 691 (Chehalis Indians); Exec. Order of March 1, 1910, III Kappler 685 (Mescalero).

[27] *See* the Tribe's Supplemental Points and Authorities, in *Navajo Tribe v. New Mexico and United States, et al.*, Nos. 84-1418 and 84-1764 (10th Cir.). The statute there involved provides in part that "the surplus lands in such part of the reservation shall be restored to the public domain and open to settlement and entry by proclamation of the President." Act of May 29, 1908, § 25, 35 Stat. 444, 457. In the

B. THE *EN BANC* MAJORITY MISREAD *SOLEM* AND RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF LOWER FEDERAL COURTS

1. The *en banc* majority's decision that the historic Uintah and Uncompahgre reservations were not disestablished ultimately rests on the proposition that restoration to public domain language "is *not* the same as a congressional state of mind to disestablish," and hence, "does *not* reliably establish the clear and unequivocal evidence of Congress's intent to change boundaries." (Pet. App. 11a-12a) (emphasis added). In so holding, the majority acknowledged that this had not been the law prior to *Solem* and, indeed, all of the judges who had considered this case before *Solem* agreed that such language was synonymous with disestablishment. *See* Pet. App. 71a-72a (panel opinion); id. at 100a (Doyle, J., dissenting); *id.* at 215a-216a (district court opinion). To the *en banc* majority, however, *Solem* altered this long-standing principle of interpretation and marked a new direction in this Court's view of turn-of-the-century legislation concerning Indian reservations. Thus, the *en banc* majority concluded that "[u]nder the *Solem* standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the congressional enactments in question" (Pet. App. 8a).

The majority's reading of *Solem* is not correct. *Solem* did not establish new "standards" and it did not alter the principles announced in *Seymour, Mattz, DeCoteau* and *Ro-*

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district court, the United States there contended that "Since the land was returned to the public domain, the reservation was terminated." Reply Brief of the United States on Motion to Dismiss, at p.6, No.82-1148-JB (D.N.M.). See also *Blatchford v. Winans*, Civ. No. 0384 (D.N.M.), a pending *habeas corpus* action involving the same area, in which petitioner also argues that after the *en banc* majority's decision here it is no longer the law that such language is "inconsistent with reservation status." Petitioner's Brief, at pp.7-8.

sebud, which the Court in *Solem* described as having "established a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase lands within established reservation boundaries." 465 U.S. at 470. Although the Court has added several relevant factors to the traditional indicia of legislative intent, including how Congress and the Department of the Interior have treated the area in later years and whether the area has "lost its Indian character" because it is "predominately populated by non-Indians" (*Solem,* 465 U.S. at 471 & n.12), the Court has not departed from the governing principle "that congressional intent will control" (*Rosebud,* 430 U.S. at 586; *Solem,* 465 U.S. at 470-71).

In determining whether an Indian reservation exists, one must therefore first examine the face of the relevant legislation. *Rosebud,* 430 U.S. at 587. In each of the disestablishment cases decided before *Solem,* the Court expressly acknowledged that restoration to public domain constitutes firm and unequivocal language of disestablishment. *See Rosebud,* 430 U.S. at 589 & n.5; *DeCoteau,* 420 U.S. at 426-27, 446; *Mattz,* 412 U.S. at 504 n.22; *Seymour,* 368 U.S. at 354-55. In the clearest possible terms, the Court stated that restoration to the public domain meant "stripped of reservation status." *DeCoteau,* 420 U.S. at 446. The United States also has consistently taken the position that such language constituted an explicit expression of a congressional intent to disestablish.[28]

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[28] *See* Memorandum for the United States as *Amicus Curiae,* at 12-14, *Rosebud Sioux Tribe v. Kneip,* No.75-562 (April 17, 1976); Brief for the United States as *Amicus Curiae,* at 8, 15, & 17-18, *Rosebud, supra* (September, 1976); Brief for the United States as *Amicus Curiae,* at 10 & 16-17, *DeCoteau v. District County Court,* Nos.73-1148 & 73-1500 (November, 1974); Brief for the United States as *Amicus Curiae,* at 24, *Mattz v. Arnett,* No.73-1182 (March, 1973). For instance, in *Rosebud,* the United States emphasized that "the clear language of other Acts

The decisions in *Rosebud* and *DeCoteau* fairly reflect the view of the Court on this point. Although in both cases the Court was divided on the question whether the particular area involved had retained reservation status, the Court was unanimous that such restoration language amounted to an unequivocal expression of an intent to disestablish. *See Rosebud,* 430 U.S. at 589 n.5; *id.* at 618 (Marshall, J., dissenting); *DeCoteau,* 420 U.S. at 426-27, 446; *id.* at 463 (Douglas, J., dissenting). Indeed, Justice Marshall—who wrote the Court's opinion in *Solem*—observed in his dissenting opinion in *Rosebud* that an 1889 surplus land act expressly restoring lands to the public domain (25 Stat. 896, § 21) was "yet another example" of " 'clear language of express termination. . . ' ." *Id.,* 430 U.S. at 618.[29]

Contrary to the *en banc* majority, *Solem* did not reject this firmly-established rule of interpretation. The crucial provision interpreted in *Solem* did not provide for the restoration of the surplus lands to the public domain, nor was any such language contained in the operative portions of the *Solem* legislation. Instead, a reference to "public domain" appeared in a subsequent section providing that tribal members could harvest timber on certain portions of the opened lands, "only as long as the land remained part of the public domain." § 9, 35 Stat. 464. The Court acknowledged that even this oblique reference was evidence of disestablishment; it found, however, that because the phrase was "isolated," it could not be dispositive. *Solem,* 465 U.S. at 475.

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expressly restoring lands to the public domain is notably absent. . . ." Brief for the United States, *supra,* at 8.

[29] For "additional examples," Justice Marshall cited (430 U.S. at 618) the National Indian Law Library's compilation of Allotment/Cession Statutes, which states that "[t]hose statutes we have titled 'restored to the public domain' are those which appear to have the *clearest language* of disestablishment. . . ." Compilation, at 2 (Doc. No. 002279) (emphasis added).

In justifying its expansive interpretation of *Solem*, the *en banc* majority also relied upon a footnote in *Solem* stating that there was "considerable doubt as to what Congress meant in using. . ." public domain terminology in the *Solem* legislation since the affected lands "could be conceived of as being in the 'public domain' inasmuch as they were available for settlement" (*id.*, 465 U.S. at 475 n.17). It is evident, however, that the Court did not intend this statement in *Solem* to overrule its prior decisions and to discount the significance of public domain language in every other instance. The Court had already indicated that such language supported the disestablishment claim and, in any event, the Court would hardly have confined its comments to one sentence in a footnote had it intended such a drastic departure from the views, expressed by both the majority and dissenting Justices in the prior cases, regarding the significance of such restoration language.

The *en banc* majority's decision to the contrary also overlooks the *Solem* Court's later observation, in the context of subsequent jurisdictional history, that:

> "Unentered lands were considered a part of the reservation. They were available for allotment to tribal members, they were leased for the benefit of the tribe, *and they were specifically defined as different from land in public domain.*"

Id. at 480, n.25 (emphasis added), *quoting* F. Hoxie, *Jurisdiction on the Cheyenne River Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908*, at 87 (undated). The reference to public domain in the quoted passage can only be understood on the basis that public domain and reservation status are mutually exclusive.[30] In short, *Solem* does not, as the *en banc* majority

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[30] This is how the author of the quoted study understood it, as he considered public domain status to be crucial in interpreting the subsequent jurisdictional treatment of the area involved. *See* Hoxie, at 87-

below believed, signal this Court's abandonment of its previous interpretations of restoration to public domain language. Such language continues to be the clearest expression of disestablishment and the court below erred in holding otherwise.

2. Although *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, ___U.S. ___, 105 S.Ct. 3420 (1985),[31] required that the various Acts involved here, which contain identical operative language, should be interpreted to have the same effect, the *en banc* majority did not do so and thereby compounded its error. In this regard, there was no dispute that the so-called "Gilsonite Strip"—a 7,000 acre tract located on the edge of the original Uintah Reservation—was disestablished by the Act of May 24, 1888 (25 Stat. 157). *See, e.g.*, Pet. App. 24a (Seymour, J., concurring). *Compare id.* at with *id.* at 166a-167a (district court opinion). *See also* Panel Opinion, *id.* at 104a (Doyle, J., dissenting). As Judge Seymour stated, "Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip. . . ." Pet. App. 24a. Yet the operative provisions concerning the Gilsonite Strip used the same language as the 1894 (Uncompahgre) and 1902 (Uintah) surplus land Acts and expressly restored the area "to the public domain" (§ 1, 25 Stat. 157). The *en banc* majority offered no reason why the restoration language contained

88. Thus, he stated that it was necessary to determine whether the area in question was "administered as part of the public domain. . . ." *Id.*, at 87.

[31] In that case, the issue was whether the Tribe retained treaty hunting and fishing rights in an area ceded under a 1901 cession agreement. *See* 105 S.Ct. at 3422. In interpreting this agreement, the Court initially looked to the construction given a prior treaty with the same Tribe containing similar cession language. *See* 105 S.Ct. at 3422, 3428. As the Court there explained, "[p]resumptively, the similar language used in the 1901 Cession Agreement should have the same effect." 105 S.Ct. at 3428.

in the 1894 (Uncompahgre) and 1902 (Uintah) Acts should be interpreted differently and there is none.[32]

3. The decision below is also at odds with the decisions of other courts of appeals in disestablishment cases. The Eighth and Ninth Circuits, in a long line of decisions, have consistently recognized that restoration to public domain language is an explicit expression of Congressional intent to disestablish.[33] Decisions of the Tenth Circuit prior to *Solem* had also assumed that such language was synonymous with disestablishment.[34] The significance these de-

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[32] The dissent, on the other hand, relied upon the understanding of the parties regarding the effect of the 1888 Act in interpreting the 1902 surplus land Act, as amended. *See* Pet. App. 46a, 53a-54a.

[33] *See, e.g., Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 90 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977); *United States ex rel. Feather v. Erickson*, 489 F.2d 99, 100 (8th Cir. 1973), *rev'd on other grounds sub nom. DeCoteau v. District County Court*, 420 U.S. 425 (1975); *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687-88 (8th Cir. 1973); *Beardslee v. United States*, 387 F.2d 280, 285 (8th Cir. 1967) (Blackmun, J.); *DeMarrias v. South Dakota*, 319 F.2d 845, 846 (9th Cir. 1963); *Russ v. Wilkins*, 624 F.2d 914, 915, 924 & 927-29 (9th Cir. 1908) (Hoffman, J., dissenting), *cert. denied*, 451 U.S. 908 (1981); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 696 (9th Cir. 1976). *See also Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 817 n.8 (8th Cir. 1983), *cert. denied*, ___U.S. ___(1984); *United States ex rel Cook v. Parkinson*, 525 F.2d 120, 124 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977); *Putnam v. United States*, 248 F.2d 292, 295 (8th Cir. 1957).

District court and state court decisions in the disestablishment context have been to the same effect. See, *e.g., Russ v. Wilkins*, 410 F. Supp. 579, 581-82 (N.D. Cal. 1976), *rev'd on other grounds*, 624 F.2d 914 (9th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *United States ex rel. Condon v. Erickson*, 344 F. Supp. 777, 778 (D.S.D. 1972), *aff'd*, 478 F.2d 684 (8th Cir. 1973); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1005 (D. Minn. 1971); *Stankey v. Waddell*, 256 N.W.2d 117, 119 (S.D. 1977); *Wood v. Jameson*, 130 N.W.2d 95, 99 (S.D. 1965); *Lafferty v. State*, 125 N.W.2d 171, 174 (S.D. 1963).

[34] *See Ellis v. Page*, 351 F.2d 250, 251-52 (10th Cir. 1965); *Tooisgah v. United States*, 186 F.2d 93, 98, 104 (10th Cir. 1950) (Phillips, J.,

cisions accorded to restoration to public domain language has a sound historical foundation and follows well-established principles regarding the public lands. *See* Pet. App. 40a (Seth, J., dissenting). Long before the acts in question here, it was settled law that when the federal government appropriates or reserves a tract for any purpose, such as an Indian reservation, the tract is thereby severed from the public domain—that is, it loses its status as public lands.[35] In 1889, for instance, this Court remarked that:

> The doctrine first announced in *Wilcox* and *Jackson*, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands . . . has been reaffirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

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dissenting).

The Utah Supreme Court also had decided that the original Uintah reservation ceased to exist, but that court did so without detailed discussion; accordingly, this Court vacated the judgment and remanded for further consideration in light of *Rosebud*. *Brough v. Appowara*, 553 P.2d 934 (Utah 1976), *vacated*, 431 U.S. 901 (1977). However, when the case returned to state trial court, it was removed to federal district court. (District Judge Ritter had previously restrained the State from proceeding in reliance on *Brough*.) The case was ultimately dismissed without any State court having considered the issue in light of *Rosebud*.

[35] *See, e.g., Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839); *Leavenworth, Lawrence, and Galveston Railroad Co. v. United States*, 92 U.S. 733, 745 (1875); *Hastings and Dakota Railroad Co. v. Whitney*, 132 U.S. 357, 360-61 (1889); *Bardon v. Northern Pacific Railroad Co.*, 145 U.S. 535, 539 (1892); *Spalding v. Chandler*, 160 U.S. 394, 404-05 (1896); *Gibson v. Anderson*, 131 F. 39, 41-42 (9th Cir. 1904); *United States v. Tichenor*, 12 F. 415, 421 (D. Ore. 1882); *Kansas Pacific Ry. Co. v. Atchison, Topeka & Santa Fe R. Co.*, 13 F. 106, 107 (D. Kan. 1881); *United States v. Payne*, 8 F. 883, 893-94 (W.D. Ark. 1881). "Public domain" and "public lands" traditionally have been regarded as "equivalent" concepts. *Barker v. Harvey*, 181 U.S. 481, 490 (1901).

Hastings and Dakota Railroad Co., 132 U.S. at 360-61. Contrary to the *en banc* majority's view, because the reservation of a tract removed it from the public domain,[36] later restoration of the tract to the public domain firmly signified the end of reservation status.[37]

In sum, the *en banc* majority's interpretation not only is inconsistent with the decisions of this Court and the lower federal courts in Indian reservation boundary cases, but also is untenable from an historical perspective. At the turn of the century, reservation status and public domain status were uniformly understood to be mutually exclusive. In construing restoration language as it has, the Tenth Circuit has thus attempted to "remake history," which this Court admonished "cannot" be done in order to resurrect a reservation that long ago ceased to exist.

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[36] As the Solicitor of the Department of the Interior explained years later in regard to the original Uintah Reservation, "[a]lthough the . . . reservation had been created out of the public domain, the land comprising it did not occupy the status of public domain land while included within the reservation. . . ." Solicitor Opinion M-36051, at 5 (December 7, 1950).

[37] See *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue in that case was whether the Sioux Tribe was entitled to compensation for certain lands reserved for it by executive orders but later " 'restored to the public domain' . . ." by the President. *Id.* at 325. In holding that no compensation was due, the Court expressly found that the two Executive Orders restoring the lands to the public domain (I Kappler 884-85, 899) "terminated the reservation. . . ." *Id.* at 330. At the same time, the Court observed that:

> It is true that on several of the many occasions when *Congress itself abolished executive order reservations*, it provided for a measure of compensation to the Indians. In the Act of July 1, 1892 [27 Stat. 62], *restoring to the public domain* a large portion of the Colville reservation and in the Act of February 20, 1893 [27 Stat. 469], *restoring a portion* of the White Mountain Apache Indian Reservation, Congress directed that the proceeds from the sale . . . be used for the benefit of the Indians. . . .

Id. at 330-31 (emphasis added)(footnotes omitted).

DeCoteau, 420 U.S. at 449; *accord Rosebud,* 430 U.S. at 615.

C. THE DECISION BELOW FAILED TO ADHERE TO THE PRINCIPLES ESTABLISHED IN THIS COURT'S RESERVATION BOUNDARY DECISIONS

1. After disregarding clear language of disestablishment on the basis of its misreading of *Solem,* the *en banc* majority proceeded to ignore other factors that must be considered not only under *Solem* but also under this Court's prior decisions. Summarizing these decisions, the Court in *Solem* stated that when the area involved "has long since lost its Indian character, we have acknowledged that *de facto,* if not *de jure,* diminishment may have occurred. . . ." 465 U.S. at 471. Thus, "who actually moved onto opened reservation lands is . . . relevant to deciding whether a surplus land Act diminished a reservation. . . ." *Id.*

> When an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian Country seriously burdens the administration of state and local governments. . . .

Id. at 471-72, n.12.

Here, the demographic history of the area vividly shows that the decision below will not materially advance the interests of tribal sovereignty, but will severely hamper the functioning of state and local government. The disputed area "lost its Indian character" long ago. It is "predominantly populated by non-Indians," 18,000 of them, with only 1,500 Tribal members, who are in any event living mainly on trust lands (Pet. App. 38a; note 1 *supra).* They—the non-Indians—are the ones "who actually moved onto the opened reservation lands" and have been there ever since. It is their "justifiable expectations," built up over a 60-year period, that would be upset if the decision below is allowed to stand and it is their interests the *en banc* majority ignored, despite this Court's command that

such factors must be taken into account. *E.g., Rosebud,* 430 U.S. at 605; *Solem,* 465 U.S. at 471.

The result is that the Ute Tribe would preside over an area owned and predominantly populated by non-Indians and hence, in which the Tribe has little presence and no real interest as a sovereign. At the same time, state and local authority would be significantly limited despite the fact that this area has principally been the concern and responsibility of these governments, not the Tribe. Indeed, to this day, the United States continues to disclaim any administrative responsibility with respect to the historic Uncompahgre reservation. *See, e.g.,* Federal Government Memorandum in *Andrus v. Utah, supra,* at 4, 6. If such an incongruous result were mandated by the decisions of this Court, those decisions would warrant reexamination. But just the opposite is true. The *en banc* majority disregarded the "clean analytic structure" this Court has developed (*Solem,* 465 U.S. at 470) and, in doing so, reached a result that cannot be sustained.

By focusing all its attention on *Solem,* and treating it as setting forth new principles—the supposed "*Solem* standards" or "*Solem* test" (Pet. App. 8a, 9a)—the *en banc* majority blinded itself to the teachings of the Court's earlier decisions. In addition to the statutory language, "the 'surrounding circumstances,' and the 'legislative history' are to be examined" in interpreting surplus land enactments. *Rosebud,* 430 U.S. at 587. *Accord, e.g., Solem,* 465 U.S. at 469-70. The record here demonstrates that the *en banc* majority did not consider these factors in a manner consistent with the relevant precedents.

2. *The Uncompahgre Reservation.* As the dissenting opinion discusses, there was a clear continuity of purpose between the 1894 Act containing public domain language (28 Stat. 337) and the 1897 Act, which mandated the opening of the original Uncompahgre reservation (30 Stat. 87). See Pet. App. 43a-44a. The legislative history of the 1897 Act

shows that the purpose of this provision was to carry forth and implement the 1894 Act.[38] It shows as well that the purpose remained disestablishment.[39] The *en banc* majority did not explain how, in the face of this legislative history, Congress could have intended the original Uncompahgre reservation to remain intact. More than that, the *en banc* majority failed even to discuss the matter (See Pet. App. 9a-14a).

The record also shows that, with the opening in 1898, there was "a widely held, contemporaneous understanding. . ." (*Solem*, 465 U.S. at 471) that the Uncompahgre reservation had been disestablished. Again, the *en banc* majority does not discuss the fact that officials of the Department of the Interior immediately began to refer to

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[38] *See* 30 Cong. Rec. 714 (Sen. Cannon), 716-17 (Sen. Rawlins), 718 (Sen. Pettigrew), 817 (Rep. King), 832 (Rep. King), and 1118 (Rep. Shafroth). The following remarks of Senator Cannon of Utah are directly on point:

> More than that, Mr. President, it [passage of the subject bill] will show that the Congress of the United States has some self-respect. It passed a law in 1894, and the Secretary of the Interior . . . chose to violate his word and violate that law, and refused to permit it to be carried out, and the Congress . . . *can not do a better thing than to put right on an appropriation bill a provision for the absolute execution of a law which itself was on an appropriation bill.*

30 Cong. Rec. 715 (emphasis added).

[39] *See* 30 Cong. Rec. 718 (Sen. Pettigrew), 828-29 (Rep. Maguire), 832 (Rep. King), and 1119 (Rep. King). For instance, Senator Pettigrew pointedly observed that:

> I fail for my part, after carefully investigating this question, to find an argument, *a reason why we should continue to hold in reserve 2,000,000 acres of land,* now the property of the United States, in which the Indians have no interest whatever. . . .

30 Cong. Rec. 718 (emphasis added).

and treat the area as the "former" or "late" reservation.[40] The record also reveals a firm understanding that the unallotted lands were "restored to the public domain."[41] Because these materials contain unambiguous expressions of disestablishment by government officials responsible for implementing federal Indian policy, they constitute authoritative, contemporaneous statements reflecting the intent of Congress. *See, e.g., Rosebud,* 430 U.S. at 602-03.

Moreover, the *en banc* majority failed to take into account contemporaneous legislation treating the original Uncompahgre reservation as having ended.[42] The Act of March 1, 1899, for example, described the area as the "former Uncompahgre Indian Reservation." 30 Stat. 940. Because this provision was passed by the same Congress which enacted the 1897 Act (*viz.*, the 55th Congress), it constitutes compelling evidence of a congressional intent to disestablish. *See Rosebud,* 430 U.S. at 603 n.25 (significance attributed to similar legislation passed shortly after the subject act "by the same Congress. . .").

Finally, the *en banc* majority said nothing about the unwavering position of the Department of the Interior since 1897 that the historic Uncompahgre reservation no longer exists, a position the federal government has taken in this Court. *See* Federal Government Memorandum in *Andrus v. Utah, supra,* at 6. Nor did the *en banc* majority opinion

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[40] *See, e.g.,* [1898] Commissioner of Indian Aff. Rept. at 43 (JX 108); [1899] Commissioner of Indian Aff. Rept. at 43, 351-52 (JX 117); Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated April 12, 1899 (JX 113); H.R. Doc. No. 33, 58th Cong., 1st Sess., at 1, 2 (1903) (Letters of the Secretary and Commissioner); Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated July 27, 1903 (JX 168).

[41] [1899] Commissioner of Indian Aff. Rept. at 543 (JX 117); [1900] Commissioner of Indian Aff. Rept. at 615 (JX 123); [1901] Commissioner of Indian Aff. Rept. at 669 (JX 154); [1904] Commissioner of Indian Aff. Rept. at 564 (JX 198).

[42] *See* Act of March 1, 1899, 30 Stat. 924, 940; Act of March 3, 1903, 32 Stat. 982, 998; Act of April 30, 1908, 35 Stat. 70, 95.

address the 1948 Act (62 Stat. 72)—the Hill Creek Extension—extending what was then the Tribe's existing reservation to include lands situated within the original Uncompahgre reservation, which, in the words of the Solicitor General, would have constituted "a futile act if the latter Reservation still subsisted. . . ." Federal Government Memorandum in *Andrus v. Utah, supra,* at 5.[43] In the 1948 Act itself, Congress once more referred to the historic Uncompahgre reservation in the past tense, that is, as the "former" reservation. 62 Stat. 77 (§ 2). Moreover, "nothing since 1948 indicates any Congressional change of mind. . . ." Federal Government Memorandum in *Andrus v. Utah, supra,* at 5.

Given its constancy, this long standing administrative and congressional treatment was entitled to considerable weight. But here it was given none, contrary to *Rosebud's* instruction that:

> the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the "jurisdictional history.

430 U.S. at 604.

3. *The Uintah Reservation.* With respect to the Uintah reservation, the *en banc* majority thought the 1905 Act (33 Stat. 1069), extending the time for opening, supplanted the 1902 Act (32 Stat. 263) restoring the lands to the public domain. *Compare* Pet. App. 6a, *with id.* at 52a-57a (Seth, J., dissenting). The legislative history of the 1905 Act, however, contains compelling evidence that Congress was implementing, not abandoning, the 1902 Act's purpose to end the Uintah reservation. *Compare* S.Rep. No. 4240, 58th Cong., 3d Sess., at 14-16 (1905) (letters of the Commissioners of Indian Affairs and the General Land Office)

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[43] The concurring opinion at least acknowledges that the Act seems "irreconcilable with continued reservation status. . . ." Pet. App. 25a.

with Pet. App. 53a (Seth, J., dissenting) ("[n]othing in the Congressional debates suggests an attempt to change the 1902 intent. . . .")

That the 1905 Act carried the 1902 Act into effect is clearly demonstrated by the Presidential Proclamation opening the original Uintah reservation for entry and settlement. Presidential Proclamation of July 14, 1905, 34 Stat. 3119, employing much the same format as that used in the 1904 Rosebud Proclamation, provided:

> Whereas it was provided by the Act of Congress, approved May 27, . . . 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "*shall be restored to the public domain:* . . . ."
>
> And, whereas, *the time for the opening of said unallotted lands* was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), *and was again extended* to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> [The Act is here quoted]
>
> Now, therefore, I . . . do hereby declare . . . that all the unallotted lands in said reservation, excepting such as have at that time been reserved . . ., and such mineral lands as may have been disposed of . . ., will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement, and disposition under the general provisions of the homestead and townsite laws of the United States. . . .

34 Stat. at 3119-20 (emphasis added).

The President thus clearly understood that the 1905 Act was implementing, not deviating from, the purpose of disestablishment underlying the 1902 Act. Consequently, like the Proclamation involved in *Rosebud,* the 1905 Proclamation constitutes an "unambiguous, contemporaneous, statement, by the Nation's Chief Executive of a perceived disestablishment. . ." (*id.,* 430 U.S. at 602-03), and, as such, unmistakably reflects the intent of Congress. *See id.* at 603. On this subject again the *en banc* majority opinion is silent.

Moreover, the Proclamation does not stand alone. The understanding of other responsible governmental officials has, until recent years, consistently mirrored President Roosevelt's construction.[44] Many of the documents cited in the margin expressly recognize that, with respect to the original Uintah reservation, the unallotted and unreserved lands were restored to the public domain under the provisions of the 1902 Act. The record shows as well that officials of the Interior Department treated the original Uintah reservation as having been disestablished. Thus,

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[44] *See, e.g.,* Letter of the Acting Commissioner of Indian Affairs to the Secretary of Interior, dated May 11, 1905, at 3 (JX 463); Letter of the Acting Secretary of Interior, dated September 3, 1909; Letter of the Commissioner of the General Land Office to Senator Reed Smoot, dated December 20, 1909; Letter of the Secretary of Interior to Senator Reed Smoot, dated January 12, 1911; H.R. Doc. No. 892, 62d Cong., 2d Sess., at 1-2 (1912) (Joint Report of Inspector James McLaughlin and the Chief Supervisor); H.R. Doc. No. 1250, 63d Cong., 3d Sess., at 1-2 (1914) (letter of the Secretary); Letter of the Commissioner of the General Land Office to the Commissioner of Indian Affairs, dated September 28, 1922, at 1 (JX 403); Letter of the Commissioner of Indian Affairs, dated December 1, 1927, at 2; 54 I.D. 559, 561-62 (1934) (JX431); Solicitor Opinion M.33626, at 2 (August 3, 1944); Secretarial Order, 10 Fed. Reg. 12409 (1945) (LD 183); 59 I.D. 393 (1947); Solicitor Opinion M-36051, at 1-2, 5 (December 7, 1950); *Appeal of Edward M. Brown,* A-26523, at 1-2 (December 11, 1952); *Appeal of Charles B. Gonsales,* at 1 (January 23, 1953); Secretarial Order, 36 Fed. Reg. 19920 (1971) (LD 210).

with the opening of the reservation, Department officials immediately began referring to the original area as the "former" reservation. For decades after the opening in 1905, Interior officials consistently administered only the trust lands—the tribal grazing reserve, the allotments, and the lands later restored to tribal ownership and reservation status—as the Tribe's existing reservation,[45] a practice that continued until recently.[46] The response of the Secretary of the Interior in 1919 to a Senate Resolution requesting information concerning the Indians in Duchesne and Uintah Counties, illustrates the point. The Secretary stated that the Uintah Indian Reservation "comprises 291,141.65 acres. . ." (S.Doc. No. 78, at 1)—essentially, the area of the Tribal grazing reserve.

Moreover, by holding that the original Uintah reservation remains intact, the *en banc* majority has created what must be one of the few—if not the only—Indian reservations engulfing a national forest. The district court and the panel of the court of appeals had agreed that such an

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[45] *See, e.g.*, H.R. Rep. No. 5010, 59th Cong., 1st Sess., at 1-2 (1906) (letters of Secretary of Interior and Commissioner of Indian Affairs); Presidential Proclamation dated September 1, 1906, 34 Stat. 3228; Letter of the Acting Commissioner of Indian Affairs, dated September 26, 1907, at 1 (JX 336); Letter of the First Assistant Secretary of the Interior to the Commissioner of Indian Affairs, dated November 8, 1907, at 1 (JX 338); H.R. Doc. No. 1279, 60th Cong., 2d Sess., at 2-3 (1909) (1908 Letters of Secretary and Commissioner of Indian Affairs); Letter of the Secretary of Interior, dated December 19, 1908, at 1, 2, 4, & 6 (JX 341); 39 I.D. 79 (1910) (Acting Secretary of Interior). *See also* 34 I.D. 549, 549-50 (1906) (Ass't. Attorney General).

[46] *See, e.g.*, 773 F.2d at 1105 (Seth, J., dissenting); S.Doc. No. 78, 66th Cong., 1st Sess., at 1 (1919) (letter of the Secretary of the Interior); 1929 Annual Report of the Uintah & Ouray Agency, at 1 (JX 420); 1931 Agency Grazing Report, at 1, 3 (JX 424); 1931 Annual Agency Report, at 4 (JX 425); 1932 Annual Agency Report, at 1 (JX 427); H.R. Rep. No. 370, 77th Cong., 1st Sess., at 3 (1941) (Report submitted by Secretary of Interior); Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada & Utah*, at 155 (1976) (JX 480).

anomaly was not intended and that the forest provisions of the Act of March 3, 1905, 33 Stat. 1048, 1069-70, which set aside more than 1 million acres "as an addition to the Uintah Forest reserve, subject to the laws, rules and regulations governing forest reserves," thereby diminished the original Uintah reservation. Pet. App. 94a-95a. The *en banc* majority thought, incorrectly, that under *Solem* the transfer of the administration of these 1 million acres from the Interior Department to the Department of Agriculture and the fact that Congress later compensated the Tribe for its interest in the forest lands were not inconsistent with continued reservation status (Pet. App. 7a-8a). Despite the fact, as the district court stated, that the "status and purpose of national forest lands are distinct from the status and purpose of Indian reservations" (Pet. App. 250a), the *en banc* majority apparently believed that under *Solem* this could be ignored and that the Tribe therefore had jurisdiction within this national forest (Pet. App. 8a). There is, however, nothing in this Court's *Solem* opinion that justifies such an extraordinary result. Congress clearly ended the original Uintah reservation on the land withdrawn for a national forest, which further demonstrates its intention to disestablish the reservation itself.

Subsequent legislation and other congressional materials are to the same effect.[47] Judicial pronouncements also fol-

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[47] *See, e.g.*, Act of July 20, 1912, 37 Stat. 196; S.Rep. No. 139, 59th Cong., 1st Sess., at 1 (1906); H.R. Rep. No. 291, 59th Cong., 1st Sess., at 1 (1906); S.Rep. No. 893, 62d Cong., 2d Sess., at 1-2 (1912); H.R. Rep. No. 943, 62d Cong., 2d Sess., at 1-2 (1912); S.Rep. No. 979, 69th Cong., 1st Sess., at 1-2 (1926); H.R. Rep. No. 2047, 69th Cong., 2d Sess., at 2 (1927); 74 Cong. Rec. 3408 (1931).Characteristic of Congress' treatment is the Act of July 20, 1912, which provided that

> any person who has heretofore made a homestead entry for land which was *formerly a part* of the Uintah Indian Reservation in the State of Utah, *authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto*. . . .

37 Stat. 196 (emphasis added). *See also Rosebud*, 430 U.S., at 603, n.25.

low suit. In decisions rendered prior to this litigation, the courts interpreted the 1905 Act as merely amending, not superseding, the 1902 Act.[48] Indeed, in 1946, the Tenth Circuit expressly held in *Hanson v. United States*—a decision unaccountably ignored by the *en banc* majority—that the unallotted and unreserved lands of the original Uintah Reservation were "restored to the public domain by the Act of May 27, 1902. . . ." *Id.* at 163.

Finally, until recently the Ute Tribe itself treated only the trust lands as the Tribe's post-1905 reservation.[49] As the dissent observed:

> Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray Reservation as currently containing 1,010,000 acres. . . .

Pet. App. 57a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[48] *See Hanson v. United States*, 153 F.2d, at 162-63; *Uintah and White River Bands of Ute Indians*, 139 Ct.Cl., at 5-6 & 21-22; *United States v. Boss*, 160 F. 132, 132-33 (D. Utah 1906); *Sowards v. Meagher*, 108 P. 1112, 1114 (Utah 1910).

[49] *See, e.g.*, 1957 Ute Ten-Year Development Program, at 66-68 (JX 465); 1966 Review and Revision of the Uintah & Ouray Indian Reservation-Wide Program, at 7, 8; 1969 Annual Report of the Uintah Indian Tribe, at 1 (JX 473).

Respectfully submitted.

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Dated: May 5, 1986

APPENDIX

APPENDIX A

United States Court of Appeals,
Tenth Circuit.

Nos. 81-1827, 81-1901.

The UTE INDIAN TRIBE,
Plaintiff-Appellant and Cross-Appellee,
v.
The STATE OF UTAH,
Defendant-Appellee,

Duchesne County, a political subdivision of the State of Utah, Roosevelt City, a municipal corporation, Duchesne City, a municipal corporation, and Uintah County, a political subdivision of the State of Utah, Defendants-Appellees and Cross-Appellants.

Indian tribe brought action seeking declaratory and injunctive relief establishing exterior boundaries of reservation. The United States District Court for the District of Utah, Central Division, 521 F.Supp. 1072, Bruce S. Jenkins, Chief Judge, determined that except for specific acts, all lands within original boundaries or reservation remained Indian country, and concluded that Uncompahgre Reservation had been disestablished, and appeals were taken. The Court of Appeals, 716 F.2d 1298, affirmed in part and reversed in part. On motion for rehearing, the Court of Appeals, William E. Doyle, Circuit Judge, held that: (1) Uintah Reservation was not diminished, and (2) Uncompahgre Reservation was not diminished.

Affirmed in part and reversed in part.

Seymour, Circuit Judge, filed concurring opinion in which Holloway, Chief Judge, and McKay and Logan, Circuit Judges, joined.

Seth, Circuit Judge, filed dissenting opinion in which Barrett, Circuit Judge, joined.

Daniel H. Israel of Cogswell & Wehrle, Denver, Colo., and Martin Seneca, Reston, Va. (Scott B. McElroy and Julian M. Izbiky of Cogswell & Wehrle, Denver, Colo., and Robert Thompson, Fort Duchesne, Utah, with them on brief), for plaintiff-appellant/cross-appellee Ute Indian Tribe.

Dallin W. Jensen, Sol. Gen., Salt Lake City, Utah (David Wilkinson, Utah Atty. Gen., and Michael M. Quealy, Asst. Atty. Gen., Salt Lake City, Utah, with him on brief), for defendant-appellee State of Utah.

Tom D. Tobin, Tobin Law Offices, P.C., Winner, S.D. (Dennis L. Draney, Roosevelt City Atty., Roosevelt, Utah, Ronald Uresk, Duchesne City Atty., Roosevelt, Utah, and David Albert Mustone, Tobin Law Offices, P.C., Washington, D.C., with him on brief), for defendants-appellees/cross-appellants Cities and Counties.

Carol E. Dinkins, Asst. Atty. Gen., Robert L. Klarquist and Martin Green, Dept. of Justice, Washington, D.C., on brief for amicus curiae U.S.

Before HOLLOWAY, Chief Judge, and SETH, DOYLE, BARRETT, McKAY, LOGAN, and SEYMOUR, Circuit Judges.

ON REHEARING EN BANC

WILLIAM E. DOYLE, Circuit Judge.

The above entitled matter was considered by the court en banc on the motion for rehearing. The result was that

the majority of the Judges decided that there should be reconsideration and a different result. It will be recalled that in the dissenting opinion which was written previously, this writer agreed with the position which has been taken by District Judge Jenkins (*Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D.Utah 1981), who generally ruled that the Uintah Reservation and its lands remain the property of the tribes that are involved. As to the questions whether the acts dealing with the Uintah Forest and the Uncompahgre Reservation mean that the Indians lost title to these lands, the view of this writer is contrary to the view of the trial court.

I.

THE UINTAH ISSUE

With respect to the case against disestablishment, it was even clearer in connection with the Uintah Indian Reservation than the other areas. The district court pointed out in its opinion that the Act of May 5, 1864, 13 Stat. 64, which established the Uintah Reservation provided that "the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" 521 F.Supp. 1072 at 1111, quoting H.R.Rep. No. 660, 53d Cong., 2d Sess., 1-3 (1894). The Uintah Reservation was thus clearly established as a permanent home for the Ute Tribe. Considering that Congress' intent to establish and set aside the Uintah Reservation was clearly expressed, disestablishment of that reservation would require an equally clear expression of congressional intent to change the status of the reservation.

Recently the Supreme Court decision in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), clarified that only in two types of situations should courts find that Congress intended to disestablish an Indian reservation. The first of these is when Congress uses explicit

language of cession in an opening act and also gives indication of an unconditional commitment to compensate Indians for their opened lands. 104 S.Ct. at 1166. The other situation is when "events surrounding the passage of a surplus land act, particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—unequivocally reveal a widely-held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . ." *Id.* But neither the intent behind the Indian Appropriations Act of 1905, ch. 1479, 33 Stat. 1048, [hereinafter cited as 1905 Act] that allegedly diminished the Uintah Reservation, nor the language used in that Act, is sufficiently clear to support a finding that the Act disestablished or diminished the Uintah Reservation. Indeed the language used in that Act is sufficiently clear to support a finding that the Act did not disestablish or diminish the Uintah Reservation. Neither the language used in that Act nor any other aspect of it gives clear support for a finding that the Act disestablished or diminished the Uintah Reservation. Nor does the legislative history support the allegation approached.

The original opinion, 716 F.2d 1298, in this case inferred, from a series of laws passed between 1902 and 1905, that Congress intended to diminish the size of the Uintah Reservation. The opinion stated that Congress' intent in passing the Indian Appropriations Act of 1902, ch. 888, 32 Stat. 245, [hereinafter cited as 1902 Act] was to disestablish the Reservation and that its original intent carried through to the 1905 Act that actually opened the Reservation to non-Indian settlers. The object of this was certainly different from the conclusion that was set forth. But we now conclude that no intention to alter the Reservation's boundaries was present. Actually the intent was to open the Reservation to non-Indian settlers and this couldn't effect the result that was suggested.

The district court's opinion was indeed well researched on this question, and others as well. The 1902 Act would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands. As a result of the impasse, Congress passed additional legislation in 1903 and 1904 extending the time set for the opening of the Reservation. *See* Indian Appropriations Act of 1903, ch. 994, 32 Stat. 982, 997-98; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. Finally, Congress passed the 1905 Act, opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the Reservation, did not contain the public domain language used in the 1902 Act.

It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," 716 F.2d at 1312, that carried through into the 1905 Act. To do so is inconsistent with the Supreme Court's longstanding directive, reiterated in *Solem*, that in the absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." 104 S.Ct. at 1167. It is impossible to draw disestablishment conclusions or inferences from these congressional statements.

An examination of the 1902-1905 series of Congressional enactments with the proper "solicitude for the Indian tribes," *Solem*, at 1167, provides inferences against diminishment. The district court's initial decision that the Uintah Reservation was not disestablished or diminished is correct. The strongest inference that is to be drawn from Congress' actions is that Congress wished surplus Uintah Reservation lands to be put to productive use. With respect to the Reservation's boundaries, the only inference that can be drawn is that Congress had no intention for

them to change. Congress' use of "homestead and township acts" language in the 1905 Act, as contrasted with its use of "public domain" language in the 1902 Act, is evidence of a clear retreat from any desire to effect a wholesale diminishment of the Reservation.[1]

The original opinion's conclusion that the Uintah Reservation was diminished by the 1905 Act is not correct. Indeed we accept the district court's view that the Reservation's boundaries were not changed by the 1905 Act.

II.

THE FOREST RESERVE PROBLEM

We will next discuss the status of the 1,010,000 acres of the Uintah Forest Reserve, which was set aside under the authority of the 1905 Act. The Act provided:

> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary.

33 Stat, at 1070.

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[1] The brief submitted by the Cities and Counties suggests that the 1905 Act necessarily diminished the Uintah Reservation because BIA personnel and local residents immediately thereafter began referring to the "former" reservation. These contemporaneous interpretations of the Act are entitled to little weight. Congress' authority over reservations is plenary, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903), and it is Congress' intent that must govern our decision. The interpretation, wishful or not, given to the 1905 Act by whites living in the Reservation area cannot overcome the lack of compelling evidence that Congress intended to diminish the Uintah Reservation.

There is nothing in the 1905 Act or in its legislative history which establishes a "total surrender of tribal interests" or a "widely-held contemporaneous understanding that the affected reservation would shrink," as required by *Solem*, 104 S.Ct. at 1166. The act merely authorized President Theodore Roosevelt to set apart reservation lands as a forest reserve. This he did. Proclamation of July 14, 1905, 34 Stat. 3113. Indeed the 1905 Act specifically reserved the Utes' timber interests in the lands by authorizing forest officials to sell as much timber as could be safely sold for fifteen years and to pay the money to the Utes. 33 Stat. at 1070.

There is clear evidence that Congress did not intend to extinguish the forest lands of the Uintah Reservation. That evidence is shown when the 1905 Act is contrasted with the Act of Apr. 4, 1910, ch. 140, 36 Stat. 269. The latter clearly extinguished a portion of the reservation lands for reclamation purposes. The reclamation lands were originally set aside under the authority of the 1905 Act. This was in the same manner as the forest lands which had been set aside. Yet five years later Congress showed that it could be explicit when it dealt with the reclamation lands. It said: "All right, title and interest of the Indians in the said lands are hereby extinguished, and control thereof shall pass to the owners of the lands irrigated from said project. . . ." 36 Stat. at 285. In contrast, Congress never enacted a subsequent statute extinguishing the Utes' interests in the lands withdrawn for the forest reserve.

Also, when Congress compensated the Utes for 973,779 acres of the forest lands in 1931, it recognized the lands as "belonging to such Indians." Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092.

Despite the fact that neither the language of the 1905 Act nor its legislative history evidences congressional intent to remove the forest lands from the Uintah Reser-

vation, the district court and this court in its original opinion concluded that the reservation had been diminished because withdrawal of lands for a forest reserve was inconsistent with continued reservation status. 521 F.Supp. at 1138; 716 F.2d at 1314. In reaching this decision, both courts stressed that the administrative authority over the forest lands was transferred from the Department of the Interior to the Department of Agriculture. Such a change in the administration of the lands, however, does not rise to the level of a subsequent event establishing clear congressional purpose to diminish, as required by *Solem*, 104 S.Ct. at 1166-67.[2]

We therefore conclude that the Uintah Reservation was not diminished by the withdrawal of the national forest lands.

III.

THE UNCOMPAHGRE RESERVATION

Following rehearing it became necessary to consider the status of the Uncompahgre Reservation in Utah. This is said to be the least popular of the group. The position which is taken by the district court and by this court in the earlier opinion was that the entire Uncompahgre Reservation had been disestablished. However, there is a lack of evidence of this fact unless there can be disestablishment by failure to develop the area. The State of Utah supports the district court's original decision. Under the *Solem* standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the congressional enactments in question. It must be mentioned, however, that this is, for the most

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[2] The applicable forest service laws mentioned in the 1905 Act are limited by 16 U.S.C. § 480, which provides that criminal and civil jurisdiction is not affected by the existence of a national forest. Thus, Indian jurisdiction does extend to Indians on forest lands.

part, a very dry area whose highest value, in addition to agriculture, is its mineral deposits, such as gilsonite, etc. On this account, there is some interest on the part of development parties.

It is interesting to note that there exists no clear expression of congressional intent to disestablish the affected areas, including this one, as contemplated by the court in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

In *Solem* it was found that it was difficult to disestablish an Indian reservation. It went on to say Congress must "clearly evince" an intent to change boundaries before diminishment will be found. *Id.* The *Solem* test for determining whether tracts remain a reservation emphasizes this factor. The *Solem* court also stated that subsequent events such as demographic transformations of the area should be examined and regarded. However, subsequent events should be assessed to a "lesser extent" than the statutory language and surrounding circumstances. *Id.* .

We now turn to apply these principles to the 1894 and 1897 Acts.

In 1894, bills were introduced providing "for opening the Uncompahgre and Uintah Reservations." H.R. 4511, 6557, 53d Cong. 2d Sess. (1894); see S.Rep. No. 450, 53d Cong., 2d Sess., 4027 (1894). It is to be noted that these bills were never enacted. However, the Indian Appropriations Act for 1894 included H.R. 6557, with changes. We first consider the 1894 Act's operative language, set forth below.[3]

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[3] Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows: Allotments in severalty of said lands shall be made as follows: To each head of a family one-

The 1897 statute which ultimately opened the Uncompahgre Reservation provided:

> The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncom-

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quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided,* That, with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location: *And Provided,* That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

Sec. 21. That the remainder of the lands on said reservation, shall, upon the approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: *Provided,* That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances. *Provided,* That after three years actual and continuous residence upon agricultural lands from date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not commuted at the end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed

> pahgre Ute Indians now located upon or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

We mentioned above that there is some interest due to the presence of minerals and it should be mentioned here that the land contains gilsonite and other minerals and unquestionably there is more interest in these features than in limited agricultural activites that have operated in the area.

The question as to whether the statutory language of the 1894 and 1897 acts disestablished the Uncompahgre Reservation calls for an interpretation based on historical research. This court's previous opinion concluded that the statutory language of the 1894 Act established a "baseline" purpose to disestablish which the 1897 Act executed. 716 F.2d at 1306. The opinion read the term "restore to public domain" in the 1894 Act as an indication of a clear congressional intent to remove the Uncompahgre land from the Indians. Our conclusion is that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb

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for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.

the ownership of the land by the tribal group. There are several competing meanings that could be implied from the phrase "restore to the public domain." But the most important one is that it permits the invasion of an area and purchase of land and general utilization. It is said that it is equally plausible that the phrase means that Indian lands would be available for settlement, but that the boundaries remain unchanged. The original expression "return to the public domain" does not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries. *Solem,* 104 S.Ct. at 1166.

Our reading of the statutory language of the 1894 and 1897 Acts indicates that there is no explicit language of cession, termination, or any other reference to " the present and total surrender of all tribal interests." *Id.* The provisions of these acts are in sharp contrast to the statutory language in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) where "termination" was found. *See also Mattz v. Arnett,* 412 U.S. 481, 504, 93 S.Ct. 2245, 2257, 37 L.Ed.2d 92 (1973). Secondly, we have not found any language which promises the Indians any certain sum for their lands as in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 591, 97 S.Ct. at 1365.

As in *Solem,* 104 S.Ct. at 1169, the references in the 1894 Act to being in "the public domain" and being "open to entry" do not present "an explicit expression of congressional intent to diminish" the Uncompahgre Reservation. We fully agree with this viewpoint.

The circumstances surrounding the passage of the Acts also fail to establish a clear congressional purpose to disestablish the Reservation. Our reading of the Act's objectives is that they merely opened lands to public entry and failed to extinguish the Reservation.

Our conclusions are first, that the opening of the Uncompahgre Reservation was never formally or informally negotiated between the federal government and the Tribe

of Indians. There was never an understanding on the part of the Tribe that they would lose their reservation as a result of the 1897 Act. The Uncompahgres never bargained for the termination of the exterior boundary of their reservation. For example, in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 584, 97 S.Ct. at 1361 and *DeCoteau v. District County Court,* 420 U.S. 425, 446, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975), the Court found formal negotiation between the tribes and the federal government which resulted in termination. Unlike these earlier cases, the Uncompahgre Indians had no understanding that they were losing their reservation in exchange for a specific benefit.

It is true that the other evidence as to "surrounding events" is ambiguous. The Cities and Counties cite newspaper articles from the period which refer to the Uncompahgre Reservation as the old or former reservation. No particular significance can be given to these articles since they were written from the white settlers' points of view. But these statements do not enjoy any official significance. *DeCoteau v. District County Court,* 420 U.S. at 443, n. 27, 95 S.Ct. at 1092, n. 27.

We agree with the Tribe that the restoration of vacant and undisposed lands in 1948 is suggestive of continued reservation status. *See Mattz v. Arnett,* 412 U.S. 481, 505-06, n. 25, 93 S.Ct. 2245, 2258 n. 25, 37 L.Ed.2d 92. The conclusion to be drawn is that the surrounding events concerning the 1894 and 1897 Acts are ambiguous. They provide no substantial and compelling evidence of a congressional intention to diminish Indian lands. *Solem,* 104 S.Ct. at 1167. The inconclusive nature of this evidence leads us to the conclusion of *Solem:* "We are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and the the old reservation boundaries survived the opening." *Id.* at 1167 (citations omitted). Therefore, we hold that the Uncompahgre Reservation has not been disestablished or diminished.

In summary, we conclude that there are no explicit references to boundary changes and disestablishment in the language of the 1894 or 1897 Acts. We also conclude that there is no evidence of a widely-held understanding on the part of the affected Tribe that the Uncompahgre Reservation would be disestablished.

IV.

CONCLUSION

In closing, we find no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations. We reverse the district court holding insofar as it found the Uncompahgre Reservation disestablished and the Uintah Reservation diminished by the withdrawal of the forest lands. In all other respects we affirm the district court's decision.

SEYMOUR, Circuit Judge, with whom HOLLOWAY, Chief Judge, and McKAY and LOGAN, Circuit Judges, join, concurring.

I concur in Judge Doyle's opinion holding that Congress did not disestablish either the Uintah Reservation, in whole or in part, or the Uncompahgre Reservation. The views expressed by both Judge Doyle and the district court in *Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072 (D.Utah 1981), amply support this conclusion with respect to the Uintah Reservation as a whole. However, the district court held that Congress had extinguished that portion of the Uintah Reservation designated as a forest reserve, and all of the Uncompahgre Reservation. I write separately from Judge Doyle to amplify those points I find critical to his conclusion that the district court erred in this respect.

I.

UNCOMPAHGRE RESERVATION

The claim that Congress has never disestablished the Uncompahgre Reservation poses a difficult analytical problem. Although both the district court and the panel decided that the reservation had been disestablished, neither court had the advantage of evaluating the issue in light of *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). *Solem* is particularly helpful in this instance, and a review of its premises will assist our analysis.

Solem recognizes that Congress passed a number of surplus land acts at the turn of the century, in response both to pressure for new land and to the prevailing view that Indians should be assimilated into American society through transition to a private agrarian economy. *See Solem*, 104 S.Ct. at 1164. The land acts were intended to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement.[1] *Id.* Because each of these land acts was "the product of a unique set of tribal negotiation and legislative compromise," *id.*, each act must be construed independently to determine whether it resulted in actual disestablishment or diminishment of a reservation.

This task is complicated by Congress' failure to distinguish between property interest, i.e., or title to the land in question, and reservation status. During the relevant period, ownership of the land and its assets provided the

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[1] The General Allotment Act of 1887, ch. 119, 24 Stat. 388, gave the President discretion to allot reservation lands to resident Indians and, with tribal consent, to sell surplus lands. A transitional act, it maintained the reservation system but tried to facilitate the allotment process. The Act envisioned the abolition of the reservation system only after this process was complete. *See Mattz v. Arnett*, 412 U.S. 481, 496-97, 93 S.Ct. 2245, 2253-54, 37 L.Ed.2d 92 (1973). Congress later enacted specific legislation to assure the opening of a particular reservation. *Id.* at 497, 93 S.Ct. at 2254.

focus of congressional interest. *See, e.g.*, 30 Cong.Rec. 816-40 (1897) (LD 45).[2] "Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries." *Solem*, 104 S.Ct. at 1165 (citing Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151)). Consequently, allotment in severalty to individual Indians and subsequent entry by non-Indians is entirely consistent with continued reservation status. *See Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 2254, 37 L.Ed.2d 92 (1973).

Moreover, at the turn of the century, members of Congress assumed that Indians would eventually be assimilated and the reservation system then dismantled. They were therefore less concerned with the effect of a statute on reservation boundaries than in opening the land to non-Indians. *Solem*, 104 S.Ct. at 1164-65. This expectation never came to pass, but it contributed to the ambiguity of certain statutory language and the anticipated effect of that language. These considerations are essential in evaluating the Tribe's claim.

With this context in mind,[3] *Solem* directs us to look to the language of the particular act and the circumstances underlying its passage to determine whether Congress clearly evinced an intent to change boundaries. *Id.* at 1165-66. Appropriately, the most probative evidence of congres-

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[2] The record on appeal includes a Joint Compendium of Legislative Documents including Executive Orders, Presidential Proclamations, and certain Secretarial Orders, compiled and used by the district court. *See* Rec., vol. XI, XII. In addition to formal citation form, these sources are referred to parenthetically by their corresponding compendium index numbers, LD 1 to LD 217.

[3] *Solem* cautions that the Court has "never been willing to extrapolate from this expectation [of demise of the reservation system] a specific congressional purpose of diminishing reservations with the passage of every surplus land act." *Solem*, 104 S.Ct. at 1165. Nor will diminishment be "lightly inferred." *Id.* at 1166.

sional intent is the statutory language used to open Indian lands. *Id.* at 1166. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* Explicit language of cession is not, however, a prerequisite for a finding of diminishment. When such language is missing, we must determine whether "events surrounding the passage of a surplus land act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—*unequivocally* reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . ." *Id.* (emphasis added).

The first surplus land act which pertains to the Uncompahgres was adopted in 1894. *See* Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38 (LD 35). The Act provided for allotment of land to the Indians for which they would be required to pay. The Act further provided that unallotted land, i.e., land considered either unsuitable or unnecessary for the Indians' needs, "shall, by proclamation, be restored to the public domain and made subject to entry [under the homestead and mineral laws of the United States]." *Id.* ,§ 20 at 337. Although the district court and the panel viewed this as language of cession, I believe that *Solem* dictates a different result. The act at issue in *Solem* used the term "public domain" in reference to the lands within the purported reservation, as well as the phrase "within the respective reservations thus diminished." *Solem,* 104 S.Ct. at 1168-69. The Court acknowledged that these isolated references might support a finding of diminishment, but found them "hardly dispositive" when balanced against the "stated and limited goal of opening up reservation lands for sale to non-Indian settlers." *Id.* at 1169. The Court further noted that there was "considerable doubt as to what Congress meant in using these

phrases . . . [since] unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." *Id.* at 1169 n. 17 (citations omitted).

Ultimately, I interpret *Solem* to hold that "public domain" language standing alone is insufficient to support a finding of explicit congressional intent to disestablish. In the case before us the ambiguity of the term is only heightened by its subsequent exclusion from the 1897 Act. *See* Act of June 7, 1897, ch. 3, 30 Stat. 62 (LD 49). Much of the text of the 1894 Act vanished in the 1897 Act, the act that actually succeeded in opening the reservation.[4] The operative phrase which used the term "public domain" was replaced by the following:

> "[A]ll the lands . . . not theretofore allotted in severalty to said Uncompahgre Utes shall . . . be *open for location and entry under all the land laws of the United States;* excepting . . . all lands containing gilsonite, asphalt, elaterite, or other like substances."

Id. at 87 (emphasis added). The panel and the district court equated this language with the earlier "public domain" language. Prior to *Solem,* "public domain" language could have been construed as more conclusive evidence of disestablishment; following *Solem,* the term must be viewed as ambiguous in portent, especially since the change in the 1897 Act reveals Congress' preoccupation with title to the opened lands. As *Mattz* reminds us, under these surplus land acts, allotment is entirely consistent with continued reservation status. *Mattz,* 412 U.S. at 497, 93 S.Ct. at 2254. More emphatically, "[o]nce a block of land is set

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[4] The terms of the 1894 Act were never fulfilled and the effort to impose the Act on the Uncompahgres was dropped in 1896. *See* S.Doc. No. 32, 55th Cong., 1st Sess. 2 (1897) (LD 46). The 1897 Act is the critical one before us, and I can see no reason to infer a baseline purpose of disestablishment from the ambiguous terms of the unrealized 1894 Act.

aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 104 S.Ct. at 1166. In this light, we cannot read the operative language of the 1897 Act as an explicit indication of congressional intent to disestablish.

We must therefore consider whether events surrounding the passage of the Act "unequivocally reveal a widely-held, contemporaneous understanding" that the reservation boundaries would be extinguished. *See id.* The Supreme Court has found disestablishment in one case where explicit language of cession was missing. In *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), the Rosebud Sioux Tribe voted in favor of an agreement to cede a portion of their reservation in exchange for a sum certain. Congress then passed a series of bills which incorporated the cession language but slightly altered the compensation provision. Although none of the acts clearly severed the Tribe's interest in the unallotted opened lands, the Court held that the statutory language read in conjunction with the agreement by the Tribe unequivocally demonstrated congressional intent to diminish. *Id.* at 587-88, 97 S.Ct. at 1363-64; *see also Solem,* 104 S.Ct. at 1165-66 n. 10.

We have no such agreement here. In fact, it is clear that the Uncompahgre Tribe vociferously opposed the terms of the 1894 Act, a fact which resulted in the failure of the allotment program. *See, e.g.,* S.Rep. No. 450, 53d Cong., 2d Sess. 1 (1894) ("they have from their long residence upon their present reservation acquired a conviction that the lands belong to them") (LD 27); H.R.Doc. No. 191, 54th Cong., 1st Sess. (1896) (Secretary of Interior response to order asking why the 1894 Act had not been implemented) (LD 39); S.Doc. 32, 55th Cong., 1st Sess. (1897) (relating fact that effort to allot pursuant to 1894

Act ceased in 1896) (LD46).[5] Therefore, other circumstances must unequivocally reveal an intent to disestablish before we can affirm the judgment of the district court.

Legislative reports make clear that Congress perceived no legal obligation to obtain the consent of the Uncompahgres, even though the Supreme Court had not yet decided that Congress could unilaterally disestablish a reservation without Indian consent. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). This is so because Congress had been informed that the Uncompahgres were entitled only to temporary occupancy of their reservation until land within the reservation could be allotted in severalty. *See, e.g.*, H.R.Rep. No. 1605, 51st Cong., 1st Sess. 2 (1890); H.R. Rep. No. 660, 53d Cong., 2d Sess. (1894) (LD 30).

The roots of this perception are not exactly clear. Before coming to Utah, the Uncompahgres had occupied a reservation in Colorado. In 1880, they were induced to cede their interest in that reservation and agreed

> "to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah."

Act of June 15, 1880, ch. 223, § 1, 21 Stat. 199, 200 (LD 11). The Act authorized the President to appoint a commission to identify eligible Indians and allot to them land in severalty within the prescribed areas. *Id.*, § 2 at 202-203. The Act further directed the Secretary of the Interior

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[5] As did congressional debate, negotiations with the Indians focused on whether they would have to pay for their allotments. This requirement was eventually dropped, but the agreement to participate in the allotment program does not imply an understanding that the reservation boundaries would disappear.

to identify "a sufficient quantity of land in the vicinities named . . ., to secure the settlement in severalty of said Indians. . . ." *Id.*, § 3 at 203. Once the Secretary had done so, and the allotment process had been completed, the Act contemplated that "all the lands not so allotted, the title to which is [by this agreement] released and conveyed to the United States, shall be held and deemed to be public lands. . . ." *Id.* Finally, the Act provided that the Indians holding allotments would be subject to the civil and criminal laws of the state or territory in which they resided "with the right to sue and be sued in the courts thereof." *Id.*, § 4 at 204.

Had nothing been done between the date of this agreement and the 1897 Act, it is arguable that the Uncompahgres might have had no *jurisdictional* rights or boundaries. *Compare* F. Cohen, *Handbook of Federal Indian Law*, ch. 1, § D3a, at 34-41 (1982) (indicating definition of Indian country under 18 U.S.C.§ 1151 (1982) may not include unrestricted allotted land) *with id.*, ch. 9, § A3a, at 499 (reservation may be established without formal executive order if administrative action reveals purpose of inducing a tribe to settle in a designated area and subsequent treatment as a reservation). However, two years later, on January 5, 1882, President Arthur established the Uncompahgre Reservation by an Executive Order. (LD 12). Nothing in the 1880 Act required him to do so; in fact, the Secretary and the Commissioner had been empowered to designate appropriate land for allotment. He may have felt obligated to create the reservation simply because no land was "found" or "available" to the Uncompahgres in Colorado. Instead, the Tribe was forced to settle in a barren region of Utah no one else yet wanted, where there were, at most, 10,000 acres of arable land out of the nearly two million acre reservation. Although the 1880 Act spoke only in terms of title to land, the subsequent Executive Order indisputably created jurisdictional rights for the Uncompahgres. It is well settled that

a reservation created by executive order has the identical legal status as one created by Congress. *See Mattz*, 412 U.S. at 492-94, 93 S.Ct. at 2251-53. Moreover, since title and reservation status are not congruent concepts, the 1882 Executive Order in no way interfered with Congress' intent that the Uncompahgres hold no title to the land.[6] It merely provided a reservation within which, until the allotment process was complete, the Uncompahgres had temporary occupancy of the whole.[7]

Following allotment, the lands could be and were opened to public purchase and settlement. Any unallotted land would then be returned to the United States, leaving only individual tribal members with allotments in severalty. *See* Act of June 15, 1880, § 3 (LD 11). But in my view it is clear that this title arrangement did not undermine the jurisdictional boundaries created by the 1882 Executive Order. The end result was an Indian reservation where the Indians held title to their allotted parcels and the remainder of the land was opened to the public.

This analysis is supported by the focus on mineral deposits during congressional debates over the 1897 Act. *See*

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[6] The order did withhold the land from sale, presumably to permit the completion of the allotment process. The 1894 and 1897 Acts would have been needed in any event to reopen the land for sale to non-Indians. It became clear that the legislation was necessary to spur the stalled allotment process. By the 1890s, Congress was also under pressure to open the land to permit mining interests to enter.

[7] The fact that the Uncompahgres did not own the land within their reservation explains why members of Congress and others considered the Uncompahgres to be in a different position than the Uintahs, who did hold title to the land within their reservation. It also explains why the United States did not have to pay the Uncompahgres for the land subsequently opened to the public. That the Uncompahgres only had temporary occupancy rights within the reservation before they received their allotments, however, does not undermine their claim that the jurisdictional boundaries were never extinguished, given the distinction between title and jurisdiction.

Ute Indian Tribe, 521 F.Supp. at 1104; *see generally* 30 Cong.Rec. 102-08, 712-20, 725, 814-21, 826-33, 1070, 1110-20, 1130, 1208-11, 1245, 1253, 1468 (1897) (LD 45). The reservation was recognized as practically barren and valuable only for its extensive deposits of gilsonite, a mineral previously monopolized by foreign producers. Congress was deeply concerned with providing access to these minerals while preventing monopolization by a few mining interests; hence the provision in both the 1894 and 1897 Acts limiting the number of claims any person could post. Congress was also confused as to the exact nature of the Uncompahgres' interest in the land, as indicated by the remarks of Representative Maguire of California in 1897:

> "Gentlemen say here that these gilsonite deposits are of no value, but the Government experts report that they are of immense value, and the struggle to secure them through the medium of this amendment shows that they are so regarded by the representatives of private interests. I do not care which statement may be true. If the deposits in question be a great body of valuable public property belonging to the citizens of the United States, we ought not to give them away in the manner proposed. If as the gentlemen from Colorado [Rep. Shafroth] has stated, they have no value, then we ought not to disturb the Indians who are now using the lands in which they lie. They should be permitted to use the land as long as it serves their purposes; certainly until another reservation shall be found for them.
>
> It is urged on the one hand that the Indians have title to or at least a vested interest in these lands, and on the other it is denied that they have any such title or interest. Respectable legal opinions have been cited on both sides, showing at least that the question is not free from doubt. Are we, upon ex parte and hasty statements of law and fact, to arbitrarily decide this question against the unrepresented Indians, and

> drive them ruthlessly from this reservation, without even the suggestion that we will not or hereafter provide them with another?"
> 30 Cong.Rec. at 828-29 (LD 45).

These remarks once again reveal Congress' preoccupation with title as well as its general confusion regarding the nature of the Uncompahgres' rights in the reservation. Given such ambiguous circumstances, it is impossible to derive any clear indication of whether Congress intended merely to open the reservation or to disestablish it. Under *Solem,* we are bound to resolve this ambiguity in favor of the Tribe. Judge Jenkins, in his thoughtful opinion, correctly pointed out the lack of congressional statements indicating that the Uncompahgre Reservation was intended to survive the opening, 521 F.Supp. at 1107, but he applied the wrong test in inferring disestablishment from this fact. Explicit congressional intent to alter reservation boundaries must be affirmatively shown.

> "When both an act and its legislative history fail to provide *substantial and compelling evidence of a congressional intention to diminish* Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening."

Solem, 104 S.Ct. at 1167 (emphasis added).

Undeniably, Congress could be explicit when it chose to be. *See Mattz,* 412 U.S. at 504-505 & n. 22, 93 S.Ct. at 2257-2258 & n. 22. Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip, *see* Act of May 24, 1888, ch. 310, § 1, 25 Stat. 157 (LD 18), and the Strawberry Reservoir Project lands, *see* Act of April 4, 1910, ch. 140, § 23, 36 Stat. 269, 285 (LD 139); *see also* Act of June 15, 1880, § 1, 21 Stat. 199, 200 (LD 11)

(ceding the Ute Colorado lands to the United States). However, no explicit language of cession can be found in either the 1894 or 1897 Acts or in their legislative history. Moreover, surrounding circumstances do not indicate a widely-held contemporaneous understanding that the *reservation boundaries* would disappear, as opposed to a transfer of the title to the lands. I believe that this is so because Congress truly was not concerned about the implications for the Indians of continued reservation status, because it anticipated the future demise of the reservation system and envisioned no influx of white settlers to that barren region. *See Solem,* 104 S.Ct. at 1164-65. Instead, Congress was concerned solely with title and access to the unique mineral deposits found there.

In addition, the subsequent history of the region does not compel a finding of disestablishment. Few people, Indian or non-Indian, live there today. The character of the area has not changed to such an extent that the reservation has de facto disappeared. *See id.* at 1167. Finally, although *Solem* accords subsequent treatment of the area by the federal government and local authorities "some evidentiary value," *id.*, these later events are not dispositive of congressional intent at the time of opening. Had such events resulted in a dramatic change in the character of a region, they would weigh more heavily. However, the one event that seems irreconcilable with continued reservation status, the 1948 Hill Creek Extension, *see* Act of March 11, 1948, ch. 108, 62 Stat. 72 (LD 187), in no way changed the character of the region. In fact, it preserved its Indian character. Absent such a change, Congress' action fifty years following the opening of the reservation does not alter my previous conclusion.

Accordingly, given the ambiguity of the statutes, congressional confusion concerning the nature of Indian rights within the reservation and how the legislation would affect those rights, the lack of an agreement with the Uncompahgres concerning cession of their interests, and

the lack of change in the character of the land, I believe that Congress never clearly evinced an intention to disestablish the Uncompahgre Reservation boundaries and that the evidence supporting such a conclusion is neither substantial nor compelling.

II.

THE FOREST RESERVE

These same principles support the conclusion that the forest reserve remains within the boundaries of the Uintah Reservation. The 1905 Act provides as follows:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary."

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1070 (LD 105). Assuming the Uintah Reservation was never disestablished, nothing in this paragraph amounts to explicit language of cession or a total surrender of Indian interests. The Act merely contemplated the opening of the reservation to non-Indians and permitted the United States to reserve those lands it wished to withhold from settlement.

I find nothing in this action inconsistent with continued tribal jurisdiction within the forest reserve, even though the laws governing national forests are comprehensive. In 1897, when Congress set forth some of the details of its policy for management of National Forests, *see* 30 Stat. 34-36, it left room for the limited exercise of jurisdiction by the state in which the forest is located. *See* 30 Stat.

36 (1897) (codified at 16 U.S.C. § 480).[8] Thus it is clear that the goals of the national forest system as of 1905, including protection of the watershed, protection of fish and game, and management of timber resources, *see, e.g.*, 30 Stat. 35 (1897); 33 Stat. 872-73 (1905), could be achieved without taking jurisdiction away from Indian Tribes. Consistent with this analysis, the United States has supported the Tribe's claim to the forest reserve throughout this litigation.

This tribal jurisdiction is limited by federal resource management policy. The U.S. Forest Service and other ederal agencies such as the U.S. Fish and Wildlife Service participate in managing the land and resources of a national forest. Because these agencies are arms of the United States entitled to sovereign immunity from the Tribe's dictates, the Tribe has no more authority to interfere with federal management of the Uintah forest reserve as a national forest than would the State of Utah. Federal agencies may choose to incorporate tribal or state laws for fishing, hunting, or the like, or they may preempt these laws by promulgating regulations designed to further federal land management policy.

As a practical matter, therefore, Indian tribal jurisdiction over the forest reserve will permit the Tribe to govern its members, but will not greatly affect non-Indians. National forest land that is on an Indian reservation is similar to land that is privately held within a reservation; it is not "land belonging to the Tribe or held by the United

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[8] 16 U.S.C. § (1982) provides:

"The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence . . .; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

States in trust for the Tribe." *Montana v. United States*, 450 U.S. 544, 557, 101 S.Ct. 1245, 1254, 67 L.Ed. 2 (1981). The Tribe's power to exercise civil authority over non-Indians on such land covers only conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. at 1258.

As Judge Doyle points out, Congress sought to protect Indian interests in the forest lands so reserved and managed. The 1905 Act authorized forest officials to sell as much timber as could be safely harvested and to pay the money to the Utes for fifteen years. The provision only indicates Congress' assumption that the reservation system would be dismantled in the near future. Since we have construed the 1905 Act to open rather than disestablish the Uintah Reservation, this provision does not indicate a present congressional intent to terminate Uintah interests in the forest reserve; indeed, it preserves them. Moreover, Congress recognized that this provision was insufficient to terminate all Indian rights in the land. This fact is indicated by comparing Congress' treatment of a reservoir site in the same Act. The Act authorized the President to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." 33 Stat. 1070. The President did so on August 3, 1905. However, Indian rights were actually terminated only when Congress passed a second statute providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished. . . ." Act of April 4, 1910, ch. 140, § 23, 36 Stat. 269, 285 (creating the Strawberry Reservoir Project) (LD 139). In contrast, Congress never specifically terminated Indian interest in the forest reserve lands.

In finding diminishment, the district court expressed concern that the presidential proclamation reserving the forest lands, *see* Proclamation of July 14, 1905, 34 Stat. 3116 (LD 107), was made pursuant to a general act au-

thorizing the President to set apart "*public land* bearing forests . . . as *public reservations.*" Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (LD 25) (emphasis added). In light of the earlier discussion of the implications of public domain language under *Solem,* I cannot see that this language alters my analysis. Congress was opening the reservation to public entry, and the United States was exercising its right to choose first from available land. The United States eventually paid for most of the land it had reserved, *see* Act of February 13, 1931, ch. 124, 46 Stat. 1092 (LD 167), and returned the remaining portion to Ute ownership, *see* Act of July 14, 1956, ch. 603, 70 Stat. 546 (LD 203). Since, as established above, such an exchange of title cannot affect reservation status, the term "public reservation" does not require us to conclude that Congress withdrew the forest reserve from the Uintah Reservation.

Nor does the fact that Congress once created a specifically Indian forest reserve compel such a conclusion. In that instance, Congress deferred to Indian management of the forest lands. Here Congress intended the lands to be federally *managed* as part of the existing Uintah Forest Reserve. As noted above, in light of 16 U.S.C. § 480, I see no conflict between federal management of forest land and continued reservation status.

Finally, I am not persuaded by the panel's reliance on *United States v. Gemmill,* 535 F.2d 1145 (9th Cir.), *cert. denied,* 429 U.S. 982, 97 S.Ct. 496, 50 L.Ed.2d 591 (1976), and *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 206 Ct.Cl. 649 (1975). In those cases, creation of a forest reserve was only one of several factors indicating the unambiguous extinguishment of Indian rights.

In sum, I would affirm the district court insofar as it holds that the Uintah Reservation was not disestablished. I would reverse the district court insofar as it holds that the portion of the Uintah Reservation reserved as a forest and the Uncompahgre Reservation were disestablished.

SETH, Circuit Judge, dissenting.

I must respectfully dissent.

These appeals concern the continued existence of the Uncompahgre and Uintah Indian reservations. The Ute Tribe in Utah fashioned a Law and Order Code which purported to exercise jurisdiction over all the lands within the original Uintah reservation created by executive order in 1861 as well as the Uncompahgre Indian reservation created in 1882, both in Utah. The State of Utah and several Utah counties and cities questioned tribal jurisdiction over much of this land arguing that a great deal of the Uintah reservation and the whole of the Uncompahgre reservation had been disestablished and was no longer "Indian Country." (18 U.S.C. § 1151.)

This Ute Tribe (the Uintah, White River and Uncompahgre bands) brought suit for declaratory judgment and injunctive relief, requesting that the present extent of the reservations and of tribal jurisdiction be determined. The trial court heard extensive testimony and performed an exhaustive study of legislative and administrative materials relating to the history of both the Uintah and Uncompahgre reservations. The transcript and the record comprise several thousand pages.

As to the Uintah reservation the trial court decided that the original reservation had been changed by several Acts of Congress directed to particular tracts. Thus Congress had removed a 7,040-acre tract known as the Gilsonite Strip in 1888, had removed 1,010,000 acres of land for National Forest purposes in 1905, and had also withdrawn 56,000 acres of land for a reclamation project in 1910. In 1948 the Uintah reservation was increased by 510,000 acres by the addition of the Hill Creek Extension. Except for these specific Acts of Congress, the trial court held that all lands within the original boundaries of the Uintah reservation remained "Indian Country." The individual al-

lotments to Indians, the public law entries by others and some mineral locations were recognized. These were, however, within the exterior boundaries of the reservation.

The trial court concluded that the Uncompahgre reservation had been disestablished.

The resolution of a dispute such as this involving Indian reservations turns on what Congress intended to accomplish at the time as a legal matter. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *see Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). The conclusions of the trial court on this point are persuasive, but are not considered to be findings of fact.

The method of examining legislative history and determining legislative intent in cases concerning Indian reservations has been addressed by the United States Supreme Court in recent times. Four such cases are especially significant to our problem. *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), was decided in 1962 and concerned the Colville Indian reservation. The Court held that the North half of the reservation had been disestablished, but the South half remained in reservation status. The Act of Congress said to have disestablished the North half declared that it should be "vacated and restored to the public domain." 27 Stat. 62, 63. The relevant acts with regard to the South half of the reservation allotted the land pursuant to the Congressional policy expressed in the General Allotment Act of 1887, 24 Stat. 390, but did not contain language of vacation and restoration or the term "public domain." *Seymour,* at 355, 82 S.Ct. at 427. The Court also mentioned subsequent legislative and administrative history of the South half of the reservation to support its conclusion that it was still a reservation. On these grounds the Court held that the South half of the reservation retained its status as Indian Country.

In *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), decided in 1973, the Court held that the Klamath River reservation had not been disestablished. The Court made it clear that the allotment of lands within the reservation to resident Indians was consistent with reservation status and an opening for settlement in addition did not disestablish. Thus a more explicit indication of Congressional intent was necessary to disestablish. However, the Court did not rest its decision on the fact that the unequivocal language of vacation and restoration to the public domain that had been present in *Seymour* was absent in *Mattz*. Clearly the Court was unwilling to suggest that there were any special recitations the absence of which would mean that a reservation continued. In addition to considering the historical background of the reservation and the legislative history, the Court observed that several bills which contained clear language of disestablishment passed the House of Representatives but did not pass in the Senate. The Court interpreted the repeated failure of those bills as a sign of Congressional intent that the reservation continue. Thus the crucial point was not simply that the final Allotment Act for the Klamath River reservation lacked language of disestablishment, but that Congress had never at any state permitted such language to be passed into law. It is important that in *Mattz* the Court stated that an opening of a reservation for settlement did not necessarily disestablish the reservation. This was referred to in the *Rosebud* opinion hereinafter considered. The settlement by Indians and non-Indians was considered to be of benefit to the Indians.

The Court in *Mattz* discussed the subsequent jurisdictional history of the reservation as an illustration for its holding of continued reservation status rather than as a foundation for that holding. No detailed analysis of legislative intent was undertaken at the time of the Acts said to constitute disestablishment for any of these cases.

DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), raised the question of whether the Lake Traverse Indian reservation survived a restoration to the public domain. The Court held that it did not, based also on the express Indian cession of the land. This feature of the *DeCoteau* case has no application to the case at bar but *DeCoteau* is important as to the significance of the phrase "public domain." The Court, in comparing the legislation there in question to other Indian agreements, stated, at 446, 95 S.Ct. at 1094:

> "That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.' "

The Court speaks as if a restoration to the public domain settled the matter of disestablishment. The position of the two phrases suggests that "returned to the public domain" is synonymous with "stripped of reservation status." With regard to the question of jurisdictional history, the fact that the State of South Dakota had exercised virtually undisputed jurisdiction over the land was important to the Court's decision.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), is of overriding importance to the determination of the case before us because it is the most recent Supreme Court case on the subject and because it provides a detailed analysis. The facts of *Rosebud* are similar to those of other disestablishment cases. The language on which the Court relies in finding disestablishment of the reservation in *Rosebud* does *not* contain a phrase analogous or similar to "vacated and restored to the public domain" of *Seymour. Rosebud* involved unilateral action by Congress rather than cession by the Indians. *Rosebud* lays out what the Court terms some "well-estab-

lished legal principles." One of these is the general rule that doubtful expressions are to be resolved in favor of the Indians. The Court cautions that the resolution of doubt in favor of the Indians is not to be done by ignoring clear indications of Congressional intent, nor does this method of resolving doubt intrude on the Court's holding in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).

The Supreme Court in *Solem v. Bartlett,* 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), considered the Cheyenne River Act of May 29, 1908. The Act authorized the Secretary to *sell* portions of the reservation within a described area with the proceeds to go to the benefit of the Indians. The opinion considers the older cases herein referred to but only decided the consequences of the Act authorizing sales. It does not provide direction as to our problem.

In *Lone Wolf* the Court held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty. This eliminated the notion that Congressional action with regard to an Indian reservation nvolved some sort of implied contract. After *Lone Wolf* in 1903 established that Congress could act unilaterally toward Indian lands and reservations, the only relevant inquiry became Congressional intent. This prevailed in *Rosebud* where the Congressional action under discussion was the ratification of an agreement with the Indians. It is significant to our problem that the Court in *Rosebud* held that a beneficial interest retained in the lands opened does not preserve to the reservation its original size and shape.

The guiding consideration in *Rosebud* is, of course, the determination of Congressional intent. The Court said f this in *Rosebud:*

> "In all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be

examined with an eye toward determining what congressional intent was."

Before turning to the application of these considerations, it is important to note one feature of the *Rosebud* analysis. In *Mattz v. Arnett,* as discussed above, the Court rejected the contention that bills passed in one House of Congress but not the other, could be an indicator of Congressional intent. *Rosebud* gives a contrary signal as Congress had failed to ratify a 1901 agreement which would have disestablished the reservation but ratified a similar agreement in 1904. The Court observed that the 1901 agreement would unquestionably have changed the reservation boundaries had it been ratified. The 1904 ratification the Court stated evinced a continuity of purpose and language with the 1901 attempt. Therefore, the 1901 agreement even though not ratified demonstrated "an unmistakable baseline purpose of disestablishment." *Rosebud,* 430 U.S. at 592, 97 S.Ct. at 1366. This line of reasoning modifies *Mattz* in explaining techniques of determining Congressional intent. Under *Rosebud,* if the language of an rlier bill is sufficiently unequivocal, and a later Act can be shown to have accomplished the intended purpose of the first, then the first gains validity as an indicator of Congressional intent even though it did not pass both Houses. This analysis has important application in the case at bar.

In *Rosebud,* as in *DeCoteau,* the assumption of state jurisdiction for many years before the suit arose was ly clear. All the same, the Court does not rely heavily on that history, but mentions it only after having arrived at a conclusion of disestablishment on the basis of legislative history and statutory construction.

It is clear from the above cases that the controlling factors are, of course, terms of the Act with legislative intent, but we are cautioned against relying on particular statutory language. However, a phrase such as "vacated and restored to the public domain" seems to be a sufficient

though not a necessary factor in disestablishment. *Compare DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), with *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). *DeCoteau* implies that language restoring the reservation to the "public domain" may be enough to constitute disestablishment. The subsequent legislative and administrative history is sometimes used to support an interpretation of an Act. Finally, considerations of jurisdictional history and contemporary opinion on reservation status seem to be relied upon only where they are unequivocal. More often, they are discussed to demonstrate that they are not necessarily contrary to the conclusion already reached on the basis of statutory language and history.

In determining legislative intent it is necessary to consider the legislation in its historical context and not as if it were passed today. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). *Mattz* refers to the "surrounding circumstances." Thus a study of the purpose of any legislation involving the Indians would be incomplete and inaccurate without a consideration of the then prevailing policy on the subject. It is apparent that such policy does not follow an unwavering line, and may not appear in a very obvious way. However, in the case before us there was a very clear and drastic policy change which was put into operation throughout the West in all the larger Indian reservations. This was the General Allotment Act of 1887, 24 Stat. 390. This expressed the policy of replacing the reservations with allotments of a tract of land to each Indian to be owned individually. This was known at the Dawes Act and was introduced by Senator Dawes of Massachusetts. He had been active in groups seeking to improve the life of the Indians.

The Secretary of Interior commented when it was pending as a bill and said in part that it would:

> "inspire the Indians with a feeling of assurance as to the permanency of their ownership of the lands they occupy and cultivate; it will give them a clear and legal standing as landed proprietors in the courts of law; it will secure to them for the first time fixed homes under the protection of the same law under which white men hold theirs; it will eventually open to settlement by white men the large tracts of land now belonging to the reservations but not used by the Indians. It will thus put the relations between the Indians and their white neighbors in the Western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions."

Report of the Secretary of the Interior, 1880, in serial 1959, pp. 5-6, 12.

Senator Dawes understood the Act to have as its goal the abolition of the reservation system. In addressing the Fifth Annual Meeting of the Lake Mohawk Conference of the Friends of the Indian, Senator Dawes stated:

> "Suppose these Indians become citizens of the United States with this 160 acres of land to their sole use, what becomes of the Indian Reservations, what becomes of the Indian Bureau, what becomes of all this machinery, what becomes of the six commissioners appointed for life? Their occupation is gone; they have all vanished, the work for which they have been created . . . is all gone. . . . You are not mending this fabric, you are taking it down stone by stone. . . ."

Minutes of the Lake Mohawk Conference, 1887, pp. 12-13.

Thus in the period between 1897 and 1905 when legislation opening the Uncompahgre and Uintah reservations

was passed, the policy embodied by the Dawes Act was in full force and being implemented. "Friends of the Indians" wished to abolish the reservations out of a genuine conviction that such an abolition would contribute to the Indians' welfare. Concurrently with Senator Dawes but separately there were present in a myriad of forms the forces of expansion always seeking the development of the West and especially seeking more land in the West. These forces were likewise effective in Congress at the time here concerned.

We cannot be here influenced by what Congress might have done. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). We must instead decide what Congress in fact did. "[O]ur task here is a narrow one. . . .[We] cannot remake history." *DeCoteau v. District County Court,* 420 U.S. 425, at 449, 95 S.Ct. 1082, at 1095, 43 L.Ed.2d 300 (1975).

The Utes argue that the original Uintah and Uncompahgre reservations exist to their original extent except as to a few relatively small tracts. The two reservations when created contained some 4,000,000 acres. In 1905, when Congress was considering legislation concerning the reservations, there were about 1,440 Utes in the three bands. There are now about 1,500 enrolled members of the tribe. Nearly all of these live on the trust lands (that is on allotments and tracts reserved for tribal use). Federal programs and services appear to be available to all regardless of the outcome of this case.

Under the decision of the trial court the non-Indian towns of Duchesne and Roosevelt are within what were considered to be the reservation boundaries. About 90 percent of the population of a reservation so constituted would live in these towns. Most of the lands opened for settlement are in Duchesne County. About 300 Indians live there, but all are not members of the tribe. No one challenges the Indians' claim to the tracts for grazing set apart

for the Indians and, of course, to the allotments made to individual Indians (about 360,000 acres) nor to the lands restored in the 1940's to the Indians (some 217,000 acres) nor to the Hill Creek Extension of about 500,000 acres. The basic dispute is to the non-Indian owned portions of the original reservations, and the National Forest portion.

Before the present dispute the trust land, the reserves and the allotments were referred to as the "Ute reservation" or the "Uintah reservation," and this explains the occasional use of the terms when additions were made extending the reservation or extending the reservation boundaries.

I. THE UNCOMPAHGRE RESERVATION

The Uncompahgre reservation when established contained about 3,000 square miles and was apparently never occupied by more than several hundred Utes at any time. Most of them by 1905 had moved to the Uintah reservation, and they had taken allotments on that reservation rather than on the Uncompahgre.

In determining the status of the Uncompahgre reservation I am chiefly concerned with two pieces of legislation. The first is part of the Indian Appropriations Act of 1894, which contains this language:

> "Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the territory of Utah, agricultural and grazing lands. . . . Said commissioners shall . . . report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

. . . .

"Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress."

Act of August 15, 1894, ch. 20, 28 Stat. 286, 337-338.

This Act directs the Secretary to immediately open the unallotted lands, after approval of the allotments to entry. The land reported as unsuitable shall "thereupon" be restored to public domain by proclamation. The use of the then universally recognized term "public domain" in designating the eventual status of the land is of critical importance. The status of "public domain" there demonstrates an intent to disestablish. *See DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Land to be in the "public domain" is inconsistent with reservation status or any particular use status. When public land is designated to be used for a particular purpose the land no longer remains in the "public domain." *Scott v. Carew,* 196 U.S. 100, 25 S.Ct. 193, 49 L.Ed. 403 (1905); *Wilcox v. Jackson,* 13 Pet. 498, 10 L.Ed. 264 (1839). Thus the creation of an Indian reservation or a forest or other particular use from public land removes it from the public domain. *Missouri, Kansas and Texas Ry. Co. v. Roberts,* 152 U.S. 114, 14 S.Ct. 496, 38 L.Ed. 377 (1894); *Leav-*

enworth, Lawrence and Galveston Railroad Co. v. United States, 92 U.S. 733, 2 Otto 733, 23 L.Ed. 634 (1875). The "public domain" is a well-recognized description of the status of the land. It was probably more generally recognized at the time the acts in issue were passed than it is now. It is clear that the creation of an Indian reservation from "public lands" removes the subject lands from the public domain. The return of particular use lands to the public domain involves similar land status concepts, and "public domain" then must have the same meaning as it did before. In *DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), the Court held that public domain status and reservation status are mutually exclusive.

Another feature of the 1894 Act is the presence of limitations on "entry" when the land is opened. The Tribe argues with respect to the Uintah reservation that limitations on entry demonstrate that Congress did not intend full public domain status for the land. The opening of the Uncompahgre reservation disproves this theory both in the 1894 Act and in the legislative history of that Act. On the face of the 1894 Act the term "public domain" appears simultaneously with provisions limiting entry. Clearly, Congress did not consider these two things to be inconsistent. The legislative history shows that the purpose of the limitation to homestead and townsite entry was not to permit the Indians to retain control of the land, but was to prevent land speculation. Congress gave a great deal of time and care to trying to prevent the land from being snapped up by speculators. 53 Cong.Rec. 7684 (1894); 53 Cong.Rec. 7258-59 (1894). At no time during these debates was there any discussion to suggest a continuing claim by the Indians. Rather the House debated whether the Indians would be required to pay for their allotted lands, implying that Indian title to the reservation was not secure even in 1894 without some payment. 53 Cong. Rec. 7258 (1894). The proper analysis is that once land has been again placed in

the public domain it is open and free to the application of the public land laws. Congress may then make limitations on entry and location, but these do not change the status of the land.

A final note about the 1894 Act is that it provides that the commission appointed to allot to the Uncompahgres should also attempt to procure the agreement of the Uintah Indians to the relinquishment of their land. Thus as early as 1894, Congress contemplated the allotment and opening of the Uintah reservation. It is difficult to escape the impression that Congress hoped and sought to have allotments made to all the Indians as individuals, and to open the land in the reservations not so allotted under the public land laws.

Thus the 1894 Act, although it did not accomplish the opening of the reservation, persuasively indicates by the use of the term "public domain" that it was Congress' intent to remove this land from the Indian reservation. The power of this phrase is not weakened by any limitations on methods of entry to the land. I therefore conclude that this piece of legislation may be sufficient to demonstrate a "baseline" purpose to disestablish that later legislation carried through. The commission appointed by the 1894 Act failed in its efforts to make allotments to the Uncompahgres and was disbanded in 1896.

In 1897, Congress enacted a provision which made the allotment and opening of the Uncompahgre reservation mandatory. Thus:

> "The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompagre Ute Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservation or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncom-

> pahgre Utes shall, on or after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States, excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances."

Act of June 7, 1897, ch. 3, 30 Stat. 62, 87.

The analogy to *Rosebud* which I have pursued here is not exact. The 1894 Act was in fact passed by both Houses of Congress, but its execution was not accomplished as we have seen. As an instrument of disestablishment it did not itself mandate the *actual opening* of the reservation, but the lands were to be restored to the public domain. When the lands became public domain they thereby were available under the public land laws to entry and location in the usual manner for all public lands. The "opening" and details for making entries were included in other acts to provide some organization to the expected rush to make entries. Thus the drawings here and at *Rosebud* were provided much like the simultaneous filings of today. Several hundred thousand people appeared for the Sioux drawings.

As the trial court observed, legislative and administrative history supports the conclusion that the Uncompahgre reservation was disestablished. The commission attempted to make allotments *after* the opening date of the 1897 Act as if the land was on a reservation. The Commissioner of Indian Affairs was unsure of the legality of this, as the lands were now in the "public domain." Rept. of the Comm. of Ind.Aff., 1898, JX 108, in H.Doc. No. 5, 55th Cong. 3d Sess. In the next few years, there were concerns that even these allotments might fail, and the Indian agent suggested that these Indians abandon the lands for lands on the Uintah reservation. *See* Letter from Acting Agent Mercer to Comm. of Ind.Aff. of Sept. 9, 1903, JX 174; Letter from Agency Clerk to the Agent of Aug. 31, 1903, JX 173; Letter from the Comm. of Ind.Aff. to Acting

Agent Mercer of July 28, 1903, JX 170. Finally, by 1929, the Bureau of Indian Affairs seems clearly to have taken the position that the Uncompahgre reservation no longer existed. *See* Statement Concerning the Uncompahgre Grazing Reserve, Feb. 6, 1943, JX 451; Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs, 1931, JX 426.

A final point illustrates both that "public domain" language was intended to apply through the 1897 Act to the Uncompahgres and that Congress, at least to some extent, considered the Uncompahgres and the Uintahs together when making law concerning the Indian reservation in Southern Utah. In the 1897 Act, it is expressly provided that the Uncompahgres may be given allotments on Uintah land. In 1902, in dealing with the Uintah reservation Congress again explicitly provided that the Uncompahgres be given allotments on Uintah land. 32 Stat. 245. This 1902 Uintah Act also contained "public domain" language. I do not rely on these connections, but they do provide some indicators of Congressional actions and intentions with regard to the Ute Tribe.

I understand Congress to have intended, and did disestablish the Uncompahgre reservation as concluded by the trial court.

II. THE UINTAH RESERVATION

An Indian reservation was established by President Lincoln in 1861 to encompass the entire valley of the Uintah River within the Utah Territory. This was at the time the Government was attempting to have the Utes of Colorado and New Mexico and others settle in designated areas. The reservation was thus for any Indian. Congress confirmed the reservation in 1864 (13 Stat. 63). This in part said:

> "Sec. 2. *And be it further enacted,* That the superintendent of Indian affairs for the territory of Utah

> be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uinta valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." (Emphasis in original.)

The reservation contained about 3,186 square miles or 2,039,040 acres, and may have been established for many more Indians than those who "were induced to inhabit the same."

In the half century following the establishment of the reservation Congress enacted several laws which the counties and cities claim altered substantially the status of the lands initially encompassed within it. The Utes claim the entire reservation as initially created save for two small diminishments, and claim that the legislation did not affect their rights. The counties and cities claim that the legislation enacted between 1888 and 1905 diminished the original reservation by withdrawing acreage on several occasions: to enable mining in the area known as the Gilsonite Strip; to enlarge the Uintah National Forest; and to create an irrigation project along the Strawberry River. The counties and cities also claim that the Acts of Congress in 1902 and in 1905 directed that allotments of lands in the reservation be made to individual Indians and provided that all lands not allotted were restored to the public domain, and thereby were no longer a part of the reservation.

The Gilsonite Strip Withdrawal

The first of the Acts of Congress was directed to a 7,000-acre tract in the reservation. In 1886 a prospector had located mining claims on the Uintah reservation for the mineral gilsonite. The land in question was not then

being used by the Indians for agricultural or grazing purposes. Congress in 1888 passes an Act which mandated that the 7,040-acre "Gilsonite Strip" be "declared to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. The Act directed the Secretary of the Interior to procure the approval of a three-fourths majority of the adult male Indians, and to sell the land. Approval was secured and some sales made. The proceeds were credited to the Utes. The trial court found, and the parties do not dispute on appeal, that the Gilsonite Strip was removed from the reservation. I agree with this conclusion. The 1888 Act contained a significant restriction on the manner of entry after the lands were restored to the public domain. Thus the lands were to be sold in lots not exceeding one-quarter section in size. The parties do not dispute that this limitation on the manner of the disposition did not affect its removal from the reservation and restored it to the "public domain."

Unallotted Lands

During the 1890's and thereafter there was increasing pressure on Congress and the President to open parts of most of the large Indian reservations in the West to settlement by non-Indians, and also to have the Indians own individual tracts of land for their own betterment. I have mentioned these two movements in this opinion. The literature of the time and the court opinions refer to these as the "familiar forces."

The familiar forces thus sought to remove parts of the Uintah Valley reservation from reservation status and so to permit individual ownership by the Indians and to open it for settlement and mining. Thus in this context, with the recognized policy evidenced by the General Allotment Act, and the opening of other reservations, the Uintah Valley reservation was not an isolated instance where the "familiar forces" brought about changes. The people seek-

ing the changes as a betterment for the Indians were sincere in their views. Many public figures advocated individual ownership by Indians, as indeed did a majority in the Congress and the President. The General Allotment Act must be taken as one example and is a clear and definite expression of the policy. Directions to carry it out were included in many pieces of legislation. This was the dominant feeling and policy of the time, the time when the legislation herein considered was passed. Its intent and purpose must be determined in that context, and not as the policies may now exist. Thus Congress in 1888 (25 Stat. 157) declared that a described portion of the Uintah Valley reservation "is hereby declared to be public lands of the United States and restored to the public domain." The Act provided that the restoration be effective upon ratification by three-fourths of the Indians on the reservation. This ratification was not obtained.

Congress also had commissions appointed to negotiate allotments and cessions of the Uncompahgre and Uintah reservation in 1894, 1897 and 1898.

Then on May 27, 1902 Congress included as part of the Indian appropriations bill a direction that allotments be made to all adult White River and Uintah Utes. This included a provision restoring any unallotted lands of the 1864 Uintah reservation to the "public domain." Act of May 27, 1902, 32 Stat. 245, 263. The provision, in pertinent part, is as follows:

> "That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three,

> on which date all the unallotted lands within said reservation shall be restored to the public domain."

The term "public domain" was used twice more in the later portions of the Act. This was one of several connected acts about which this dispute is centered and the references to "public domain" status for the lands not allotted to individual Indians are very significant to the arguments of the parties and to the position taken by the trial court. Congress thereafter used appropriation acts in 1903, 1904 and 1905 to extend the time for opening and to insert added provisions. This was a series of acts with no express words of amendment and with express repeal of relatively small elements in the prior acts.

The trial court reasoned that the Supreme Court's holding in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), compelled a finding that the language of the 1902 Act providing that all of the unallotted lands "shall be restored to the public domain" would have disestablished the reservation had the unallotted lands then been opened for settlement. The trial court reasoned, however, that this 1902 Act was so changed by a 1905 enactment that such a result did not come about.

The Utes attempt to distinguish *Seymour* by arguing that this 1902 Act may restore the unallotted lands to the public domain, but there is also needed a provision that the lands be vacated by the tribe before the lands are restored to the public domain. They argue that the cases uniformly provide that *independent* language to indicate that the reservation boundaries would be extinguished or adjusted at the same time that public entry was allowed is necessary to disestablish. They cite *DeCoteau v. District County Court*, 420 U.S. 425, 445-46, 95 S.Ct. 1082, 1093-94, 43 L.Ed.2d 300 (1975) (the express language of cession and relinquishment of reservation lands restored them to the public domain); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) (Act of March

2, 1889, § 21, 25 Stat. 896, created six separate reservations from the Great Sioux reservation and "all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain," 25 Stat. at 896); *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) ("vacated and restored to the public domain"); *Starr v. Long Jim,* 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913) (Secretary of the Interior to cause the quantity of land allowed Indians remaining on the reservation to be selected in as compact a form as possible, the remainder to be restored to the public domain, Act of July 4, 1884, 23 Stat. 76); *Russ v. Wilkins,* 624 F.2d 914 (9th Cir. 1980) (explicit description of new reservation boundaries, the remainder "restored to the public lands of the United States," 17 Stat. at 634). These cited cases, as indicated by the notes, are however a mixture of statutory provisions, and do not stand for a proposition that a provision vacating the reservation or describing new boundaries is required for disestablishment.

The argument that the operative language of restoration must contain independent language adjusting or extinguishing reservation boundaries is unpersuasive. The Supreme Court has never mentioned such a requirement, *see, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), and I see no reason to impose one now. The trial court was correct in determining that the 1902 Act would have accomplished the disestablishment of the reservation as to unallotted lands had the lands been then opened. An additional factor relative to the 1902 Act was an addition to it providing for a tract of grazing land to be set apart for the common use of the Indians to meet the reasonable need of the Indians. This provision was added by a joint resolution on June 19, 1902 (32 Stat. 744). It in part provided:

> "In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock."

This addition is significant in evaluating the 1902 Act and further demonstrates the status of the reservation lands before the opening.

After the 1902 Act

The Indian consent required by the 1902 Act was not forthcoming within the time limit to make the allotments, and Congress had to take further action. However, the matter was influenced in a very substantial way by the decision of the Supreme Court in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), decided January 5, 1903. The Court there held that Congress could unilaterally change Indian reservations; that no tribal or Indian consent was required; and that there was no contractual relationship between the Government and the tribe arising from the establishment of a reservation. As is apparent, this had significant implications on what Congress was trying to accomplish as to this reservation and as to others.

In another appropriation act Congress by the Act of March 3, 1903 (32 Stat. 982) again extended the time for opening the unallotted lands for entry as provided in the 1902 Act, and eliminated any reference to consent of the Indians.

In 1904, Congress again extended in an appropriation act the time for the opening to March 10, 1905 so that surveying could be completed and allotments made. Act of April 21, 1904, 33 Stat. 189, 207.

The trial court held, and the parties do not dispute on appeal, that the 1903 and 1904 Acts did not affect the operative terms of the 1902 Act. I agree.

The time set by the 1904 Act for allotments to be completed (March 10, 1905) was running out and Congress again used an appropriation act to extend the time. However, there were added this time some new provisions by this Act of March 3, 1905 (33 Stat. 1048). There were provided more details as to the opening of the unallotted lands for entry, and restrictions were added as well which were of significance.

This 1905 Act in part provided:

"That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof;

"That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he

considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation." (Emphasis in original.)

The Relationship of the 1902 and 1905 Acts

This court considered the relationship of the various enactments concerning the Uintah reservation and certain issues regarding the status of the unallotted lands in *Hanson v. United States,* 153 F.2d 162 (10th Cir.). We there concluded that the issue had to be decided under the 1902 Act, and that the 1905 Act merely extended the date of opening of the reservation and did not affect the operative terms of the 1902 Act.

What is advanced as "limitations" on disposition in the 1905 Act is the provision that the unallotted lands were to be disposed of under "the general provisions of the homestead and town-site laws, . . . and shall be opened to settlement and entry by proclamation of the President." The 1905 Act does not specifically utilize or repeat the "public domain" language of the 1902 Act.

The provision that the lands be opened under the homestead and townsite laws does not constitute a substantial restriction which militates against the conclusion that the public domain intent in the 1902 Act was carried over into the 1905 Act. The limitation in the *Rosebud* opening is comparable as is *Starr v. Long Jim,* 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913). The provisions considered

in *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), and in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), do not lead to a contrary conclusion. In the case before us the provisions in the prior acts dictated the public domain conclusion under the 1905 Act.

Nothing in the Congressional debates suggests an attempt to change the 1902 intent. *See* 39 Cong.Rec. 1181-85, January 21, 1905. Rather, Congress was concerned in 1905 with the possibility that land speculators would deprive actual homeseekers of the choicest land. "Indian Appropriations Bill, 1906," Hearings, Subcomm. of the Sen. Comm. of Ind. Aff., 58th Cong., 3d Sess. (1905).

The intent of the 1905 Act was thus to effect the restoration of the unallotted lands to the public domain and to allow entry under the homestead and townsite laws to prevent speculation.

Evidence of this intent can be found in the Committee Report to S. 6867 in 1905, a bill which used language virtually identical to that found in the 1905 Act. There the report included letters from the Commissioner of Indian Affairs and from the Commissioner of the General Land Office which referred to the lands as being in the public domain or as public lands. S.Rep. No. 4240, 58th Cong., 3d Sess. (1905).

It is difficult to accept the argument that limitations on the manner of entry necessarily vitiate Congressional intent to disestablish the reservation in view of the Gilsonite Strip withdrawal herein considered. There, some 7,000 acres were restored to the public domain subject to a limitation on disposition to purchase with a maximum number of acres. As I have noted, neither party disputes that the strip was removed from reservation status. Thus limitations on entry are not necessarily inconsistent with the disestablishment. As mentioned in the *Rosebud* opinion

Congress knew what operative words were needed to accomplish the purpose.

As mentioned, the changes were accomplished by a series of provisions contained in Indian appropriation acts of 1902, 1903, 1904 and 1905. Each act built on the ones before, and especially by "extending" the time for opening from those provided before. This shows a continuous process brought about by the delays encountered on the ground. The acts also did not seek to expressly amend the prior act but, as mentioned, built on the one before. This prevails as to matters other than time "extentions." There were several express repeals, but only as to specific elements which were not of significance. Thus there were no general repeals but only additions of items here of concern. This cumulative series of enactments should be compared to the position taken by the Supreme Court in *Rosebud,* as I have already mentioned. There an agreement that failed to be ratified by Congress in 1901 could be considered in determining the intent of a 1904 Act. The 1904 Act or agreement indicated continuity of purpose and language with the 1901 attempt. The 1901 agreement showed "an unmistakable baseline purpose of disestablishment." *Rosebud,* at 592, 97 S.Ct. at 1366. This same demonstration of continuity is present in the case before us and the 1902 Act does also show a "baseline purpose of disestablishment." Again, the persuasiveness is greater here because the earlier language was in acts that passed both Houses and not in bills that failed.

Even if it were not clear from the terms of the 1905 Act and its legislative history that the 1905 Act was not intended to affect the substantive terms of the 1902 Act, 39 Cong.Rec. 3868, 3919, 39 Cong.Rec. 1181-83, the contemporaneous and subsequent legislative and administrative treatment of the unallotted lands confirms that they were part of the public domain.

The most important indication of the effect of the 1905 Act is President Roosevelt's Proclamation of July 14, 1905 which stated, in relevant part:

> "Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre'.
>
> "And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> . . . .
>
> "Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States. . . ."

Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3119.

The lands were to be opened by a presidential proclamation, and of great significance in any determination of the intent of Congress is the executive implementation of the legislation. The proclamation is very similar in all significant respects to the *Rosebud* proclamation. This proclamation, with its references and adoption of terms from the 1902 Act, in my view demonstrates the continuation of the 1902 provisions, and confirms the public domain status of the unallotted lands. The proclamation is "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment" of the reservation. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 602-03, 97 S.Ct. at 1371-72.

A further indication that the unallotted lands were no longer part of the reservation after it was opened is the subsequent restoration of some of those lands to reservation status for the Utes. Much if not all of the unallotted lands on the original Uintah reservation which had not been disposed of under the public land laws were restored in 1945. The Order of Restoration recites that "pursuant to the provisions of the act of May 27, 1902 (32 Stat. 263)" the unallotted lands were made subject to disposal under the laws applying to public lands. As indicated this restoration acknowledges that the opening was under the 1902 Act. Section 3 of the Reorganization Act provides that the Secretary of the Interior is authorized "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened." Act of June 18, 1934, 73rd Cong., 2d Sess., § 3. Neither party disputes that the restorations accomplished pursuant to § 463 of 25 U.S.C. made them part of the reservation. I agree. This restoration included about 217,000 acres.

Much later administrative treatment of the unallotted lands also confirms the proposition that those lands were restored to the public domain. *See, e.g.*, Opinion of the Solicitor of the Department of the Interior, January 27,

1947, 59 I.D. 393 (unallotted lands were "restored to the public domain pursuant to the Act of May 27, 1902, as amended. . . . Although the lands were restored to the public domain, they were subject to disposition only under the Act of May 27, 1902, as amended." *Id.* at 393, 394); Letter from the Commissioner of Indian Affairs to the Secretary of the Interior, June 19, 1941.

The largest single addition occurred in 1948 when Congress added the Hill Creek Extension of some 510,000 acres of the former Uncompahgre reservation to the Uintah and Ouray reservation. Act of March 11, 1948, ch. 108, 62 Stat. 72.

I have also examined the maps introduced by the parties and the governmental statistics setting forth the acreage of the reservation and find them to support the position taken by the counties and cities. Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties were reduced as follows. . . ." (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.") The statistics of the Office of Indian Affairs show similar figures.

Both parties have introduced substantial evidence regarding administrative and legislative appellations to the "current" or "former" status of the reservation. My review of those references evinces no discernible Congressional intent one way or the other. There is simply no

consistent, clear and uniform identification of the reservation's status in the subsequent legislative record. Analysis of the newspaper accountings of the events occurring on the reservation is similarly opaque.

Thus, after closely examining the record as it relates to the unallotted lands, I must conclude that the trial court erred in holding that the unallotted lands were not returned to the public domain pursuant to the 1902 Act.

Other Issues—Pre-opening Withdrawals
Forest Reserve Lands

Besides extending the time of entry under the 1902 Act and describing the entry thereunder, the 1905 Act also provided that before the opening the President was authorized to set apart and reserve lands in the reservation as an addition to the Uintah Forest Reserve. 33 Stat. 1070. Specifically, the Act states:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest resreves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary. . . ."

By proclamation, President Theodore Roosevelt withdrew 1,010,000 acres from the Uintah reservation for that purpose. Proclamation of July 14, 1905, 34 Stat. pt. 3, 3116. The reserve was created pursuant to specific authority under the 1905 Act and the general authority he already had.

The trial court found that the presidential forest reserve proclamation extinguished those portions of the reservation included therein. On appeal, the Utes argue that the statutory language of the 1905 Act and the contemporaneous legislative history did not extinguish the reservation bound-

aries nor did Congress ever enact subsequent legislation to extinguish the Utes' title. In the proclamation creating the forest reserve out of the reservation lands it was expressly provided that the reserve be an addition to the Uintah Forest Reserve which theretofore existed. The addition was to be "subject to the laws, rules, and regulations governing forest reserves."

My review of the 1905 Act, the presidential proclamation, the pertinent legislative history and the subsequent treatment of the subject lands convinces me that the forest reserve lands are not part of the reservation. No express language of termination of Indian jurisdiction over the Forest Service lands or an express extinguishment of the reservation boundaries was required. As I noted previously the Supreme Court has held that the "clear language of express termination" is not a required talisman for termination or disestablishment. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 588 n. 4, 97 S.Ct. 1361, 1364 n. 4, 51 L.Ed.2d 660 (1977). The authority was present and was exercised to so change the land status from reservation lands to public forest reserves. The administrative authority over the lands was transferred from the Secretary of the Interior to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected the Forest Service lands to an entirely different regulatory regime. By transferring of reservation status to the status of the Forest Service lands thus for public use and by shifting the administrative authority over them, Congressional intent to remove the lands from the reservation is clearly evidenced.

My view that Indian jurisdiction is inconsistent with the land's status as forest reserve land is consonant with recent holdings by the Court of Claims and the Ninth Circuit. Both courts held that the designation of land as a forest reserve is itself effective to extinguish Indian title. *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1386, 1391-93, 206 Ct.Cl. 649 (1975); *United States v. Gemmill,*

535 F.2d 1145 (9th Cir. 1976). The Ninth Circuit went on to find that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the . . . Indians for these lands." *Id.* at 1149. The Utes received $1,217,000.00 in compensation. The situation before us is very similar as Congress added to a forest reserve by removing lands from an Indian reservation and later compensating the Indians for the lands. The trial court was correct in finding that the 1,010,000 acres withdrawn pursuant to the July 14, 1905 presidential proclamation were no longer part of the Uintah reservation.

The Strawberry River Reclamation

The third major part of the 1905 Act authorized the President before the reservation was opened to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." President Roosevelt withheld from disposal 56,000 acres along the Strawberry River for reclamation purposes pursuant to that authority in August 1905. Presidential Proclamation of August 3, 1905, 34 Stat. pt. 3, 3141.

Five years later, Congress compensated the Utes for the Strawberry River lands and clearly extinguished any Indian interest in the lands by providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished, and the title, management and control thereof shall pass to the owners of the lands irrigated from said project. . . ." Act of April 4, 1910, 36 Stat. 269, 285.

Neither side disputes the trial court's holding that the reservation was diminished to the extent of the 56,000-acre Strawberry River withdrawal.

The withdrawal of lands for the Strawberry River irrigation project does not give rise to any implication that the unallotted lands remained part of the reservation. The Strawberry River lands were set apart and reserved on August 3, 1905, over three weeks *prior* to the opening of the reservation on August 28, 1905. Affirmative action to remove the Strawberry River lands from the reservation was then necessary because the reservation had not yet been opened. The Strawberry River withdrawal has no bearing on the status of lands which were subsequently to be opened to the public domain.

I must repeat that these issues must be considered in the context of the aims of Congress at the time the legislation was enacted, and what was *then* sought to be accomplished. It is easy to apply later views and policies, but this should not be done. The then prevailing aims and purposes are well documented in the legislative history, and we should not now seek to apply current standards. Also, the application of then established public land law and the prevailing use and meaning of its terms are essential.

CONCLUSION

I would:

1. Affirm the trial court's holding that the original Uncompahgre reservation was disestablished by Congress pursuant to the Act of June 7, 1897 and no longer exists.

2. Affirm the trial court's holding that prior to August 28, 1905, the original boundaries of the Uintah Valley Indian reservation were diminished by Congress through the withdrawal of the Gilsonite Strip in 1888, by the withdrawal of 1,010,000 acres subsequently made part of the Uintah National Forest, and by the withdrawal of approximately 56,000 acres for the Strawberry River irrigation project.

3. Affirm the trial court's finding that the 510,000-acre Hill Creek Extension was incorporated within the Uintah and Ouray Indian reservation.

As to the Uintah Valley reservation, I would reverse the holding of the trial court that the unallotted lands at the opening remained part of the reservation. Instead it is my view that the then unallotted lands lost all reservation status, became part of the public domain, and were not within the reservation for any purpose when the reservation was opened, subject only to the special tracts herein discussed set apart for specific uses before the land was opened, and subject to valid mineral claims specifically provided for in the Acts of 1902, 1903, 1904 and 1905 and valid claims made under the general mining laws.

BARRETT, Circuit Judge, joins in this dissenting opinion.

APPENDIX B

NOVEMBER TERM - January 6, 1986

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Circuit Judges.

THE UTE INDIAN TRIBE,
Plaintiff-Appellant,
Cross-Appellee,

VS

THE STATE OF UTAH,
Defendant-Appellee
DUCHESNE COUNTY, *et al,*
Defendants-Appellees, Cross-Appellants.

Nos. 81-1827
81-1901

This matter comes on for consideration of the petitions for rehearing filed by appellees in the captioned cause.

Upon consideration whereof, the petitions for rehearing are denied.

Judges Barrett and Seth voted to grant rehearing.

Judge Anderson did not participate.

/s/HOWARD K. PHILLIPSHoward K. Phillips, Clerk

APPENDIX C

United States Court of Appeals,
Tenth Circuit.

Nos. 81-1827, 81-1901.

The UTE INDIAN TRIBE,
Plaintiff/Appellant/Cross-Appellee,
v.
STATE OF UTAH
Defendant-Appellee,

Duchesne County, a political subdivision of the State of Utah, Uintah County, a political subdivision of the State of Utah, Roosevelt City, a municipal corporation, and Duchesne City, a municipal corporation, Defendants/Appellees/Cross-Appellants,

United States of America, Amicus Curiae,

Paradox Production Corporation, a Utah corporation, Amicus Curiae.

Aug. 29, 1983.

Ute Tribe brought suit seeking declaratory and injunctive relief establishing the exterior boundaries of reservation. The United States District Court for the District of Utah, Central Division, 521 F.Supp. 1072, Bruce S. Jenkins, J., decided that the original reservation had been changed by several acts of Congress directed to particular tribes and held that, except for the specific acts, that all lands within original boundaries of reservation remained "Indian Country," and concluded that Uncompahgre Reservation had been disestablished, and appeals were taken. The Court of Appeals, Seth, Chief Judge, held that: (1) original Uncompahgre Reservation was disestablished; (2) prior to August 28, 1905, original boundaries of Uintah

Valley Indian Reservation were diminished by Congress through various withdrawals; (3) trial court erred in holding that unallotted lands were not returned to public domain pursuant to 1902 Act; and (4) extension of 510,000 acres of former Uncompahgre Reservation to Uintah and Ouray Reservation incorporated such lands into the latter two reservations.

Order accordingly.

William E. Doyle, Circuit Judge, filed separate dissenting opinion.

Daniel H. Israel of Dechert, Price & Rhoads, Denver, Colo. (Martin Seneca, Washington, D.C., with him on the brief), for plaintiff/appellant/cross-appellee The Ute Indian Tribe.

Richard L. Dewsnup, Asst. Atty. Gen., State of Utah, Salt Lake City, Utah (David L. Wilkinson, Utah Atty. Gen., Dallin W. Jensen and Michael M. Quealy, Asst. Attys. Gen., with him on the brief), Salt Lake City, Utah, for defendant-appellee State of Utah.

Tom D. Tobin of Tobin Law Offices, P.C., Winner, S.D. (David Albert Mustone of Tobin Law Offices, P.C., Washington, D.C., Dennis L. Draney, Roosevelt City Atty., Roosevelt, Utah, Roland Uresk, Duchesne City Atty., Roosevelt, Utah, with him on the brief), for defendants/appellees/cross-appellants Counties and Cities.

Carol E. Dinkins, Asst. Atty. Gen., Robert L. Klarquist and Martin Green, Attys., Dept. of Justice, Washington, D.C., on the brief for amicus curiae United States of America.

Stewart M. Hanson, Jr. and Lucy J. Skiffington of Suitter, Axland & Armstrong, Salt Lake City, Utah, on the brief for amicus curiae Paradox Production Corp.

Before SETH, Chief Judge, DOYLE, Circuit Judge, and TEMPLAR, District Judge*.

SETH, Chief Judge.

These appeals concern the continued existence of the Uncompahgre and Uintah Indian reservations. The Ute Tribe in Utah fashioned a Law and Order Code which purported to exercise jurisdiction over all the lands within the original Uintah reservation created by executive order in 1861 as well as the Uncompahgre Indian reservation created in 1882, both in Utah. The State of Utah and several Utah counties and cities questioned tribal jurisdiction over much of this land arguing that a great deal of the Uintah reservation and the whole of the Uncompahgre reservation had been disestablished and was no longer "Indian Country." (18 U.S.C. § 1151.)

This Ute Tribe (the Uintah, White River and Uncompahgre bands) brought suit for declaratory judgment and injunctive relief, requesting that the present extent of the reservations and of tribal jurisdiction be determined. The trial court heard extensive testimony and performed an exhaustive study of legislative and administrative materials relating to the history of both the Uintah and Uncompahgre reservations. The transcript and the record comprise several thousand pages.

As to the Uintah reservation the trial court decided that the original reservation had been changed by several Acts of Congress directed to particular tracts. Thus Congress had removed a 7,040-acre tract known as the Gilsonite Strip in 1888, had removed 1,010,000 acres of land for National Forest purposes in 1905, and had also withdrawn 56,000 acres of land for a reclamation project in 1910. In 1948 the Uintah reservation was increased by 510,000 acres

* Honorable George Templar, United States District Judge for the District of Kansas, sitting by designation.

by the addition of the Hill Creek Extension. Except for these specific Acts of Congress, the trial court held that all lands within the original boundaries of the Uintah reservation remained "Indian Country." The individual allotments to Indians, the public law entries by others and some mineral locations were recognized. These were, however, within the exterior boundaries of the reservation.

The trial court concluded that the Uncompahgre reservation had been disestablished, 521 F.Supp. 1072.

The resolution of a dispute such as this involving Indian reservations turns on what Congress intended to accomplish at the time as a legal matter. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660; *see Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92. The conclusions of the trial court on this point are persuasive, but are not considered to be findings of fact.

The method of examining legislative history and determining legislative intent in cases concerning Indian reservations has been addressed by the United States Supreme Court in recent times. Four such cases are especially significant to our problem. *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, was decided in 1962 and concerned the Colville Indian reservation. The Court held that the North half of the reservation had been disestablished, but the South half remained in reservation status. The Act of Congress said to have disestablished the North half declared that it should be "vacated and restored to the public domain." 27 Stat. 62, 63. The relevant acts with regard to the South half of the reservation allotted the land pursuant to the Congressional policy expressed in the General Allotment Act of 1887, 24 Stat. 390, but did not contain language of vacation and restoration or the term "public domain." *Seymour,* at 355, 82 S.Ct. at 427. The Court also mentioned subsequent legislative and administrative history of the South half of the

reservation to support its conclusion that it was still a reservation. On these grounds the Court held that the South half of the reservation retained its status as Indian Country.

In *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92, decided in 1973, the Court held that the Klamath River reservation had not been disestablished. The Court made it clear that the allotment of lands within the reservation to resident Indians was consistent with reservation status and an opening for settlement in addition did not disestablish. Thus a more explicit indication of Congressional intent was necessary to disestablish. However, the Court did not rest its decision on the fact that the unequivocal language of vacation and restoration to the public domain that had been present in *Seymour* was absent in *Mattz*. Clearly the Court was unwilling to suggest that there were any special recitations the absence of which would mean that a reservation continued. In addition to considering the historical background of the reservation and the legislative history, the Court observed that several bills which contained clear language of disestablishment passed the House of Representatives but did not pass in the Senate. The Court interpreted the repeated failure of those bills as a sign of Congressional intent that the reservation continue. Thus the crucial point was not simply that the final Allotment Act for the Klamath River reservation lacked language of disestablishment, but that Congress had never at any stage permitted such language to be passed into law. It is important that in *Mattz* the Court stated that an opening of a reservation for settlement did not necessarily disestablish the reservation. This was referred to in the *Rosebud* opinion hereinafter considered. The settlement by Indians and non-Indians was considered to be of benefit to the Indians.

The Court in *Mattz* discussed the subsequent jurisdictional history of the reservation as an illustration for its holding of continued reservation status rather than as a

foundation for that holding. No detailed analysis of legislative intent was undertaken at the time of the Acts said to constitute disestablishment for any of these cases.

DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300, raised the question of whether the Lake Traverse Indian reservation survived a restoration to the public domain. The Court held that it did not, based also on the express Indian cession of the land. This feature of the *DeCoteau* case has no application to the case at bar but *DeCoteau* is important as to the significance of the phrase "public domain." The Court, in comparing the legislation there in question to other Indian agreements, stated, at 446, 95 S.Ct. at 1094:

> "That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.' "

The Court speaks as if a restoration to the public domain settled the matter of disestablishment. The position of the two phrases suggests that "returned to the public domain" is synonymous with "stripped of reservation status." With regard to the question of jurisdictional history, the fact that the State of South Dakota had exercised virtually undisputed jurisdiction over the land was important to the Court's decision.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660, is of overriding importance to the determination of the case before us because it is the most recent Supreme Court case on the subject and because it provides a detailed analysis. The facts of *Rosebud* are similar to those of other disestablishment cases. The language on which the Court relies in finding disestablishment of the reservation in *Rosebud* does *not* contain a phrase analogous or similar to "vacated and restored to the public

domain" of *Seymour*. *Rosebud* involved unilateral action by Congress rather than cession by the Indians. *Rosebud* lays out what the Court terms some "well-established legal principles." One of these is the general rule that doubtful expressions are to be resolved in favor of the Indians. The Court cautions that the resolution of doubt in favor of the Indians is not to be done by ignoring clear indications of Congressional intent, nor does this method of resolving doubt intrude on the Court's holding in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299.

In *Lone Wolf* the Court held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty. This eliminated the notion that Congressional action with regard to an Indian reservation involved some sort of implied contract. After *Lone Wolf in 1903 established that Congress could act unilaterally toward Indian lands and reservations, the only relevant inquiry became Congressional intent. This prevailed in Rosebud* where the Congressional action under discussion was the ratification of an agreement with the Indians. It is significant to our problem that the Court in *Rosebud* held that a beneficial interest retained in the lands opened does *not* preserve to the reservation its original size and shape.

The guiding consideration in *Rosebud* is, of course, the determination of Congressional intent. The Court said of this in *Rosebud:*

> "In all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was."

Before turning to the application of these considerations, it is important to note one feature of the *Rosebud* analysis. In *Mattz v. Arnett,* as discussed above, the Court rejected the contention that bills passed in one House of Congress but not the other, could be an indicator of Congressional intent. *Rosebud* gives a contrary signal as Congress had

failed to ratify a 1901 agreement which would have disestablished the reservation but ratified a similar agreement in 1904. The Court observed that the 1901 agreement would unquestionably have changed the reservation boundaries had it been ratified. The 1904 ratification the Court stated evinced a continuity of purpose and language with the 1901 attempt. Therefore, the 1901 agreement even though not ratified demonstrated "an unmistakable baseline purpose of disestablishment." *Rosebud,* 430 U.S. at 592, 97 S.Ct. at 1366. This line of reasoning modified *Mattz* in explaining techniques of determining Congressional intent. Under *Rosebud,* if the language of an earlier bill is sufficiently unequivocal, and a later Act can be shown to have accomplished the intended purpose of the first, then the first gains validity as an indicator of Congressional intent even though it did not pass both Houses. This analysis has important application in the case at bar.

In *Rosebud,* as in *DeCoteau,* the assumption of state jurisdiction for many years before the suit arose was fairly clear. All the same, the Court does not rely heavily on that history, but mentions it only after having arrived at a conclusion of disestablishment on the basis of legislative history and statutory construction.

It is clear from the above cases that the controlling factors are, of course, terms of the Act with legislative intent, but we are cautioned against relying on particular statutory language. However, a phrase such as "vacated and restored to the public domain" seems to be a sufficient though not a necessary factor in disestablishment. *Compare DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300, with *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660. *DeCoteau* implies that language restoring the reservation to the "public domain" may be enough to constitute disestablishment. The subsequent legislative and administrative history is sometimes used to support an interpretation of an Act. Finally, considerations of jurisdictional history

and contemporary opinion on reservation status seem to be relied upon only where they are unequivocal. More often, they are discussed to demonstrate that they are not necessarily contrary to the conclusion already reached on the basis of statutory language and history.

In determining legislative intent it is necessary to consider the legislation in its historical context and not as if it was passed today. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209. *Mattz* refers to the "surrounding circumstances." Thus a study of the purpose of any legislation involving the Indians would be incomplete and inaccurate without a consideration of the then prevailing policy on the subject. It is apparent that such policy does not follow an unwavering line, and may not appear in a very obvious way. However, in the case before us there was a very clear and drastic policy change which was put into operation throughout the West in all the larger Indian reservations. This was the General Allotment Act of 1887, 24 Stat. 390. This expressed the policy of replacing the reservations with allotments of tract of land to each Indian to be owned individually. This was known as the Dawes Act and was introduced by Senator Dawes of Massachusetts. He had been active in groups seeking to improve the life of the Indians.

The Secretary of Interior commented when it was pending as a bill and said in part that it would:

> "inspire the Indians with a feeling of assurance as to the permanency of their ownership of the lands they occupy and cultivate; it will give them a clear and legal standing as landed proprietors in the courts of law; it will secure to them for the first time fixed homes under the protection of the same law under which white men hold theirs; it will eventually open to settlement by white men the large tracts of land now belonging to the reservations but not used by the Indians. It will thus put the relations between the

> Indians and their white neighbors in the Western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions."

Report of the Secretary of the Interior, 1880, in serial 1959, pp. 5-6, 12.

Senator Dawes understood the Act to have as its goal the abolition of the reservation system. In addressing the Fifth Annual Meeting of the Lake Mohawk Conference of the Friends of the Indian, Senator Dawes stated:

> "Suppose these Indians become citizens of the United States with this 160 acres of land to their sole use, what becomes of the Indian Reservations, what becomes of the Indian Bureau, what becomes of all this machinery, what becomes of the six commissioners appointed for life? Their occupation is gone; they have all vanished, the work for which they have been created . . . is all gone . . . . You are not mending this fabric; you are taking it down stone by stone. . . ."

Minutes of the Lake Mohawk Conference, 1887, pp. 12-13.

Thus in the period between 1897 and 1905 when legislation opening the Uncompahgre and Uintah reservations was passed, the policy embodied by the Dawes Act was in full force and being implemented. "Friends of the Indians" wished to abolish the reservations out of a genuine conviction that such an abolition would contribute to the Indians' welfare. Concurrently with Senator Dawes but separately there were present in a myriad of forms the forces of expansion always seeking the development of the West and especially seeking more land in the West. These forces were likewise effective in Congress at the time here concerned.

We cannot be here influenced by what Congress might have done. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660. We must instead decide what Congress in fact did. "[O]ur task here is a narrow one .... [W]e cannot remake history." *DeCoteau v. District County Court,* 420 U.S. 425, at 449, 95 S.Ct. 1082, at 1095, 43 L.Ed.2d 300.

The Utes argue that the original Uintah and Uncompahgre reservations exist to their original extent except as to a few relatively small tracts. The two reservations when created contained some 4,000,000 acres. In 1905, when Congress was considering legislation concerning the reservations, there were about 1,440 Utes in the three bands. There are now about 1,500 enrolled members of the tribe. Nearly all of these live on the trust lands (that is on allotments and tracts reserved for tribal use). Federal programs and services appear to be available to all regardless of the outcome of this case.

Under the decision of the trial court the non-Indian towns of Duchesne and Roosevelt are within what were considered to be the reservation boundaries. About 90 percent of the population of a reservation so constituted would live in these towns. Most of the lands opened for settlement are in Duchesne County. About 300 Indians live there, but all are not members of the tribe. No one challenges the Indians' claim to the tracts for grazing set apart for the Indians and, of course, to the allotments made to individual Indians (about 360,000 acres) nor to the lands restored in the 1940's to the Indians (some 217,000 acres) nor to the Hill Creek Extension of about 500,000 acres. The basic dispute is to the non-Indian owned portions of the original reservations, and the National Forest portion.

Before the present dispute the trust land, the reserves and the allotments were referred to as the "Ute reservation" or the "Uintah reservation," and this explains the occasional use of the terms when additions were made

extending the reservation or extending the reservation boundaries.

I. THE UNCOMPAHGRE RESERVATION

The Uncompahgre reservation when established contained about 3,000 square miles and was apparently never occupied by more than several hundred Utes at any time. Most of them by 1905 had moved to the Uintah reservation, and they had taken allotments on the reservation rather than on the Uncompahgre.

In determining the status of the Uncompahgre reservation we are chiefly concerned with two pieces of legislation. The first is part of the Indian Appropriations Act of 1894, which contains this language:

> "Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the territory of Utah, agricultural and grazing lands . . . . Said commissioners shall . . . report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.
>
> . . . .
>
> "Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance

> by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress."

Act of August 15, 1894, ch. 20, 28 Stat. 286, 337-338.

This Act directs the Secretary to immediately open the unallotted lands, after approval of the allotments to entry. The land reported as unsuitable shall "thereupon" be restored to public domain by proclamation. The use of the then universally recognized term "public domain" in designating the eventual status of the land is of critical importance. The status of "public domain" there demonstrates an intent to disestablish. *See DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300; *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346. Land to be in the "public domain" is inconsistent with reservation status or any particular use status. When public land is designated to be used for a particular purpose the land no longer remains in the "public domain." *Scott v. Carew,* 196 U.S. 100, 25 S.Ct. 193, 49 L.Ed. 403; *Wilcox v. Jackson,* 13 Pet. 498, 10 L.Ed. 264. Thus the creation of an Indian reservation or a forest or other particular use from public land removes it from the public domain. *Missouri, Kansas and Texas Ry. Co. v. Roberts,* 152 U.S. 114, 14 S.Ct. 496, 38 L.Ed. 377; *Leavenworth, Lawrence and Galveston Railroad Co. v. United States,* 92 U.S. 733, 23 L.Ed. 634. The "public domain" is a well-recognized description of the status of the land. It was probably more generally recognized at the time the acts in issue were passed than it is now. It is clear that the creation of an Indian reservation from "public lands" removes the subject lands from the public domain. The return of particular use lands to the public domain involves similar land status concepts, and "public domain" then must have the same meaning

as it did before. In *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300, the Court held that public domain status and reservation status are mutually exclusive.

Another feature of the 1894 Act is the presence of limitations on "entry" when the land is opened. The tribe argues with respect to the Uintah reservation that limitations on entry demonstrate that Congress did not intend full public domain status for the land. The opening of the Uncompahgre reservation disproves this theory both in the 1894 Act and in the legislative history of that Act. On the face of the 1894 Act the term "public domain" appears simultaneously with provisions limiting entry. Clearly, Congress did not consider these two things to be inconsistent. The legislative history shows that the purpose of the limitation to homestead and townsite entry was not to permit the Indians to retain control of the land, but was to prevent land speculation. Congress gave a great deal of time and care to trying to prevent the land from being snapped up by speculators. 53 Cong.Rec. 7684 (1894); 53 Cong.Rec. 7258-59 (1894). At no time during these debates was there any discussion to suggest a continuing claim by the Indians. Rather the House debated whether the Indians would be required to pay for their allotted lands, implying that Indian title to the reservation was not secure even in 1894 without some payment. 53 Cong.Rec. 7258 (1894). The proper analysis is that once land has been again placed in the public domain it is open and free to the application of the public land laws. Congress may then make limitations on entry and location, but these do not change the status of the land.

A final note about the 1894 Act is that it provides that the commission appointed to allot to the Uncompahgres should also attempt to procure the agreement of the Uintah Indians to the relinquishment of their land. Thus as early as 1894, Congress contemplated the allotment and opening of the Uintah reservation. It is difficult to escape

the impression that Congress hoped and sought to have allotments made to all the Indians as individuals, and to open the land in the reservations not so allotted under the public land laws.

Thus the 1894 Act, although it did not accomplish the opening of the reservation, persuasively indicates by use of the term "public domain" that it was Congress' intent to remove this land from the Indian reservation. The power of this phrase is not weakened by any limitations on methods of entry to the land. We therefore conclude that this piece of legislation may be sufficient to demonstrate a "baseline" purpose to disestablish that later legislation carried through. The commission appointed by the 1894 Act failed in its efforts to make allotments to the Uncompahgre and was disbanded in 1896.

In 1897, Congress enacted a provision which made the allotment and opening of the Uncompahgre reservation mandatory. Thus:

> "The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Ute Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservation or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on or after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States, excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances."

Act of June 7, 1897, ch. 3, 30 Stat. 62, 87.

The analogy to *Rosebud* which we have pursued here is not exact. The 1894 Act was in fact passed by both Houses

of Congress, but its execution was not accomplished as we have seen. As an instrument of disestablishment it did not itself mandate the *actual opening* of the reservation, but the lands were to be restored to the public domain. When the lands became public domain they thereby were available under the public land laws to entry and location in the usual manner for all public lands. The "opening" and details for making entries were included in other acts to provide some organization to the expected rush to make entries. Thus the drawings here and at *Rosebud* were provided much like the simultaneous filings of today. Several hundred thousand people appeared for the Sioux drawings.

As the trial court observed, legislative and administrative history supports the conclusion that the Uncompahgre reservation was disestablished. The commission attempted to make allotments *after* the opening date of the 1897 Act as if the land was on a reservation. The Commissioner of Indian Affairs was unsure of the legality of this, as the lands were now in the "public domain." Rept. of the Comm. of Ind.Aff., 1898, JX 108, in H.Doc. No. 5, 55th Cong. 3d Sess. In the next few years, there were concerns that even these allotments might fail, and the Indian agent suggested that these Indians abandoned the lands for lands on the Uintah reservation. *See* Letter from Acting Agent Mercer to Comm. of Ind.Aff. of Sept. 9, 1903, JX 174; Letter from Agency Clerk to the Agent of Aug. 31, 1903, JX 173; Letter from the Comm. of Ind.Aff. to Acting Agent Mercer of July 28, 1903, JX 170. Finally, by 1929, the Bureau of Indian Affairs seems clearly to have taken the position that the Uncompahgre reservation no longer existed. *See* Statement Concerning the Uncompahgre Grazing Reserve, Feb. 6, 1943, JX 451; Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs, 1931, JX 426.

A final point illustrates both that "public domain" language was intended to apply through the 1897 Act to the Uncompahgres and that Congress, at least to some extent,

considered the Uncompahgres and the Uintahs together when making law concerning the Indian reservation in Southern Utah. In the 1897 Act, it is expressly provided that the Uncompahgres may be given allotments on Uintah land. In 1902, in dealing with the Uintah reservation Congress again explicitly provided that the Uncompahgres be given allotments on Uintah land. 32 Stat. 245. This 1902 Uintah Act also contained "public domain" language. We do not rely on these connections, but they do provide some indicators of Congressional actions and intentions with regard to the Ute Tribe.

We understand Congress to have intended, and did disestablish the Uncompahgre reservation as concluded by the trial court.

II. THE UINTAH RESERVATION

An Indian reservation was established by President Lincoln in 1861 to encompass the entire valley of the Uintah River within the Utah Territory. This was at the time the Government was attempting to have the Utes of Colorado and New Mexico and others settle in designated areas. The reservation was thus for any Indian. Congress confirmed the reservation in 1864 (13 Stat. 63). This in part said:

> "Sec. 2. *And be it further enacted,* That the superintendent of Indian affairs for the territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uinta valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." (Emphasis in original.)

The reservation contained about 3,186 square miles or 2,039,040 acres, and may have been established for many more Indians than those who "were induced to inhabit the same."

In the half century following the establishment of the reservation Congress enacted several laws which the counties and cities claim altered substantially the status of the lands initially encompassed within it. The Utes claim the entire reservation as initially created save for two small diminishments, and claim that the legislation did not affect their rights. The counties and cities claim that the legislation enacted between 1888 and 1905 diminished the original reservation by withdrawing acreage on several occasions: to enable mining in the area known as the Gilsonite Strip; to enlarge the Uintah National Forest; and to create an irrigation project along the Strawberry River. The counties and cities also claim that the Acts of Congress in 1902 and in 1905 directed that allotments of lands in the reservation be made to individual Indians and provided that all lands not allotted were restored to the public domain, and thereby were no longer a part of the reservation.

The Gilsonite Strip Withdrawal

The first of the Acts of Congress was directed to a 7,000-acre tract in the reservation. In 1886 a prospector had located mining claims on the Uintah reservation for the mineral gilsonite. The land in question was not then being used by the Indians for agricultural or grazing purposes. Congress in 1888 passed an Act which mandated that the 7,040-acre "Gilsonite Strip" be "declared to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. The Act directed the Secretary of the Interior to procure the approval of a three-fourths majority of the adult male Indians, and to sell the land. Approval was secured and some sales made. The proceeds were credited to the Utes. The

trial court found, and the parties do not dispute on appeal, that the Gilsonite Strip was removed from the reservation. We agree with this conclusion. The 1888 Act contained a significant restriction on the manner of entry after the lands were restored to the public domain. Thus the lands were to be sold in lots not exceeding one-quarter section in size. The parties do not dispute that this limitation on the manner of the disposition did not affect its removal from the reservation and restored it to the "public domain."

Unallotted Lands

During the 1890's and thereafter there was increasing pressure on Congress and the President to open parts of most of the large Indian reservations in the West to settlement by non-Indians, and also to have the Indians own individually tracts of land for their own betterment. We have mentioned these two movements in this opinion. The literature of the time and the court opinions refer to these as the "familiar forces."

The familiar forces thus sought to remove parts of the Uintah Valley reservation from reservation status and so to permit individual ownership by the Indians and to open it for settlement and mining. Thus in this context, with the recognized policy evidenced by the General Allotment Act, and the opening of other reservations, the Uintah Valley reservation was not an isolated instance where the "familiar forces" brought about changes. The people seeking the changes as a betterment for the Indians were sincere in their views. Many public figures advocated individual ownership by Indians, as indeed did a majority in the Congress and the President. The General Allotment Act must be taken as one example and is a clear and definite expression of the policy. Directions to carry it out were included in many pieces of legislation. This was the dominant feeling and policy of the time, the time when the legislation herein considered was passed. Its intent and

purpose must be determined in that context, and not as the policies may now exist. Thus Congress in 1888 (25 Stat. 157) declared that a described portion of the Uintah Valley reservation "is hereby declared to be public lands of the United States and restored to the public domain." The Act provided that the restoration be effective upon ratification by three-fourths of the Indians on the reservation. This ratification was not obtained.

Congress also had commissions appointed to negotiate allotments and cessions of the Uncompahgre and Uintah reservation in 1894, 1897 and 1898.

Then on May 27, 1902 Congress included as part of the Indian appropriations bill a direction that allotments be made to all adult White River and Uintah Utes. This included a provision restoring any unallotted lands of the 1864 Uintah reservation to the "public domain." Act of May 27, 1902, 32 Stat. 245, 263. The provision, in pertinent part, is as follows:

> "That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain."

The term "public domain" was used twice more in the later portions of the Act. This was one of several connected acts about which this dispute is centered and the references to "public domain" status for the lands not allotted to individual Indians are very significant to the arguments of the parties and to the position taken by the trial court. Congress thereafter used appropriation acts in

1903, 1904 and 1905 to extend the time for opening and to insert added provisions. This was a series of acts with no express words of amendment and with express repeal of relatively small elements in the prior acts.

The trial court reasoned that the Supreme Court's holding in *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, compelled a finding that the language of the 1902 Act providing that all of the unallotted lands "shall be restored to the public domain" would have disestablished the reservation had the unallotted lands then been opened for settlement. The trial court reasoned, however, that this 1902 Act was so changed by a 1905 enactment that such a result did not come about.

The Utes attempt to distinguish *Seymour* by arguing that this 1902 Act may restore the unallotted lands to the public domain, but there is also needed a provision that the lands be vacated by the tribe before the lands are restored to the public domain. They argue that the cases uniformly provide *independent* language to indicate that the reservation boundaries would be extinguished or adjusted at the same time that public entry was allowed is necessary to disestablish. They cite *DeCoteau v. District County Court,* 420 U.S. 425, 445-46, 95 S.Ct. 1082, 1093-94, 43 L.Ed.2d 300 (the express language of cession and relinquishment of reservation lands restored them to the public domain); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (Act of March 2, 1889, § 21, 25 Stat. 896, created six separate reservations from the Great Sioux reservation and "all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain," 25 Stat. at 896); *Seymour v. Superindendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 ("vacated and restored to the public domain"); *Starr v. Long Jim,* 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (Secretary of the Interior to cause the quantity of land allowed Indians remaining on the reservation to be selected in as compact a form as

possible, the remainder to be restored to the public domain, Act of July 4, 1884, 23 Stat. 76); *Russ v. Wilkins,* 624 F.2d 914 (9th Cir.) (explicit description of new reservation boundaries, the remainder "restored to the public lands of the United States," 17 Stat. at 634). These cited cases, as indicated by the notes, are however a mixture of statutory provisions, and do not stand for a proposition that a provision vacating the reservation or describing new boundaries is required for disestablishment.

The argument that the operative language of restoration must contain independent language adjusting or extinguishing reservation boundaries is unpersuasive. The Supreme Court has never mentioned such a requirement, *see, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660; *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, and we see no reason to impose one now. The trial court was correct in determining that the 1902 Act would have accomplished the disestablishment of the reservation as to unallotted lands had the lands been then opened. An additional factor relative to the 1902 Act was an addition to it providing for a tract of grazing land to be set apart for the common use of the Indians to meet the reasonable need of the Indians. This provision was added by a joint resolution on June 19, 1902 (32 Stat. 744). It in part provided:

> "In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock."

This addition is significant in evaluating the 1902 Act and further demonstrates the status of the reservation lands before the opening.

After the 1902 Act

The Indian consent required by the 1902 Act was not forthcoming within the time limit to make the allotments, and Congress had to take further action. However, the matter was influenced in a very substantial way by the decision of the Supreme Court in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299, decided January 5, 1903. The Court there held that Congress could unilaterally change Indian reservations; that no tribal or Indian consent was required; and that there was no contractual relationship between the Government and the tribe arising from the establishment of a reservation. As is apparent, this had significant implications on what Congress was trying to accomplish as to this reservation and as to others.

In another appropriation act Congress by the Act of March 3, 1903 (32 Stat. 982) again extended the time for opening the unallotted lands for entry as provided in the 1902 Act, and eliminated any reference to consent of the Indians.

In 1904, Congress again extended in an appropriation act the time for the opening to March 10, 1905 so that surveying could be completed and allotments made. Act of April 21, 1904, 33 Stat. 189, 207.

The trial court held, and the parties do not dispute on appeal, that the 1903 and 1904 Acts did not affect the operative terms of the 1902 Act. We agree.

The time set by the 1904 Act for allotments to be completed (March 10, 1905) was running out and Congress again used an appropriation act to extend the time. However, there were added this time some new provisions by

this Act of March 3, 1905 (33 Stat. 1048). There were provided more details as to the opening of the unallotted lands for entry, and restrictions were added as well which were of significance.

This 1905 Act in part provided:

"That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof;

"That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation." (Emphasis in original.)

The Relationship of the 1902 and 1905 Acts

This court considered the relationship of the various enactments concerning the Uintah reservation and certain issues regarding the status of the unallotted lands in *Hanson v. United States,* 153 F.2d 162 (10th Cir.). We there concluded that the issue had to be decided under the 1902 Act, and that the 1905 Act merely extended the date of opening of the reservation and did not affect the operative terms of the 1902 Act.

What is advanced as "limitations" on disposition in the 1905 Act is the provision that the unallotted lands were to be disposed of under "the general provisions of the homestead and town-site laws, . . . and shall be opened to settlement and entry by proclamation of the President." The 1905 Act does not specifically utilize or repeat the "public domain" language of the 1902 Act.

The provision that the lands be opened under the homestead and townsite laws does not constitute a substantial restriction which militates against the conclusion that the public domain intent in the 1902 Act was carried over into the 1905 Act. The limitation in the *Rosebud* opening is comparable as is *Starr v. Long Jim,* 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670. The provisions considered in *Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92, and in *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, do not lead to a contrary conclusion. In the case before us the provisions in the prior acts dictated the public domain conclusion under the 1905 Act.

Nothing in the Congressional debates suggests an attempt to change the 1902 intent. *See* 39 Cong.Rec. 1181-85, January 21, 1905. Rather, Congress was concerned in 1905 with the possibility that land speculators would deprive actual homeseekers of the choicest land. "Indian Ap-

propriations Bill, 1906," Hearings, Subcomm. of the Sen. Comm. of Ind.Aff., 58th Cong., 3d Sess. (1905).

The intent of the 1905 Act was thus to effect the restoration of the unallotted lands to the public domain and to allow entry under the homestead and townsite laws to prevent speculation.

Evidence of this intent can be found in the Committee Report to S. 6867 in 1905, a bill which used language virtually identical to that found in the 1905 Act. There the report included letters from the Commissioner of Indian Affairs and from the Commissioner of the General Land Office which referred to the lands as being in the public domain or as public lands. S.Rep. No. 4240, 58th Cong., 3d Sess. (1905).

It is difficult to accept the argument that limitations on the manner of entry necessarily vitiate Congressional intent to disestablish the reservation in view of the Gilsonite Strip withdrawal herein considered. There, some 7,000 acres were restored to the public domain subject to a limitation on disposition to purchase with a maximum number of acres. As we have noted, neither party disputes that the strip was removed from reservation status. Thus limitations on entry are not necessarily inconsistent with the disestablishment. As mentioned in the *Rosebud* opinion Congress knew what operative words were needed to accomplish the purpose.

As mentioned, the changes were accomplished by a series of provisions contained in Indian appropriation acts of 1902, 1903, 1904 and 1905. Each act built on the ones before, and especially by "extending" the time for opening from those provided before. This shows a continuous process brought about by the delays encountered on the ground. The acts also did not seek to expressly amend the prior act but, as mentioned, built on the one before. This prevails as to matters other than time "extensions." There were several express repeals, but only as to specific ele-

ments which were not of significance. Thus there were no general repeals but only additions of items here of concern. This cumulative series of enactments should be compared to the position taken by the Supreme Court in *Rosebud,* as we have already mentioned. There an agreement that failed to be ratified by Congress in 1901 could be considered in determining the intent of a 1904 Act. The 1904 Act or agreement indicated continuity of purpose and language with the 1901 attempt. The 1901 agreement showed "an unmistakable baseline purpose of disestablishment." *Rosebud,* 430 U.S. at 592, 97 S.Ct. at 1366. This same demonstration of continuity is present in the case before us and the 1902 Act does also show a "baseline purpose of disestablishment." Again, the persuasiveness is greater here because the earlier language was in acts that passed both Houses and not in bills that failed.

Even if it were not clear from the terms of the 1905 Act and its legislative history that the 1905 Act was not intended to affect the substantive terms of the 1902 Act, 39 Cong.Rec. 3868, 3919, 39 Cong.Rec. 1181-83, the contemporaneous and subsequent legislative and adminstrative treatment of the unallotted lands confirms that they were part of the public domain.

The most important indication of the effect of the 1905 Act is President Roosevelt's Proclamation of July 14, 1905 which stated, in relevant part:

> "Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre'.
>
> "And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by

> the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> . . . .
>
> "Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States . . . ."

Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3119.

The lands were to be opened by a presidential proclamation, and of great significance in any determination of the intent of Congress is the executive implementation of the legislation. The proclamation is very similar in all significant respects to the *Rosebud* proclamation. This proclamation, with its references and adoption of terms from the 1902 Act, in our view demonstrates the continuation of the 1902 provisions, and confirms the public domain status of the unallotted lands. The proclamation is "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment" of the reservation. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 602-3, 97 S.Ct. at 1371.

A further indication that the unallotted lands were no longer part of the reservation after it was opened is the subsequent restoration of some of those lands to reservation status for the Utes. Much if not all of the unallotted lands on the original Uintah reservation which had not been disposed of under the public land laws were restored in 1945. The Order of Restoration recites that "pursuant to the provisions of the act of May 27, 1902 (32 Stat. 263)" the unallotted lands were made subject to disposal under the laws applying to public lands. As indicated this restoration acknowledges that the opening was under the 1902 Act. Section 3 of the Reorganization Act provides that the Secretary of the Interior is authorized "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened." Act of June 18, 1934, 73rd Cong., 2d Sess., § 3. Neither party disputes that the restorations accomplished pursuant to § 463 of 25 U.S.C. made them part of the reservation. We agree. This restoration included about 217,000 acres.

Much later administrative treatment of the unallotted lands also confirms the proposition that those lands were restored to the public domain. *See, e.g.,* Opinion of the Solicitor of the Department of the Interior, January 27, 1947, 59 I.D. 393 (unallotted lands were "restored to the public domain pursuant to the Act of May 27, 1902, as amended. . . . Although the lands were restored to the public domain, they were subject to disposition only under the Act of May 27, 1902, as amended." *Id.* at 393, 394); Letter from the Commissioner of Indian Affairs to the Secretary of the Interior, June 19, 1941.

The largest single addition occurred in 1948 when Congress added the Hill Creek Extension of some 510,000 acres of the former Uncompahgre reservation to the Uintah and Ouray reservation. Act of March 11, 1948, ch. 108, 62 Stat. 72.

We have also examined the maps introduced by the parties and the governmental statistics setting forth the acreage of the reservation and find them to support the position taken by the counties and cities. Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties were reduced as follows. . . ." (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.") The statistics of the Office of Indian Affairs show similar figures.

Both parties have introduced substantial evidence regarding administrative and legislative appellations to the "current" or "former" status of the reservation. Our review of those references evinces no discernible Congressional intent one way or the other. There is simply no consistent, clear and uniform identification of the reservation's status in the subsequent legislative record. Analysis of the newspaper accountings of the events occurring on the reservation is similarly opaque.

Thus, after closely examining the record as it relates to the unallotted lands, we must conclude that the trial court erred in holding that the unallotted lands were not returned to the public domain pursuant to the 1902 Act.

Other Issues—Pre-opening Withdrawals Forest Reserve Lands

Besides extending the time of entry under the 1902 Act and describing the entry thereunder, the 1905 Act also

provided that before the opening the President was authorized to set apart and reserve lands in the reservation as an addition to the Uintah Forest Reserve. 33 Stat. 1070. Specifically, the Act states:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, ... such portion of the lands within the Uintah Indian Reservation as he considers necessary ...."

By proclamation, President Theodore Roosevelt withdrew 1,010,000 acres from the Uintah reservation for that purpose. Proclamation of July 14, 1905, 34 Stat. pt. 3, 3116. The reserve was created pursuant to specific authority under the 1905 Act and the general authority he already had.

The trial court found that the presidential forest reserve proclamation extinguished those portions of the reservation included therein. On appeal, the Utes argue that the statutory language of the 1905 Act and the contemporaneous legislative history did not extinguish the reservation boundaries nor did Congress ever enact subsequent legislation to extinguish the Utes' title. In the proclamation creating the forest reserve out of the reservation lands it was expressly provided that the reserve be an addition to the Uintah Forest Reserve which theretofore existed. The addition was to be "subject to the laws, rules, and regulations governing forest reserves."

Our review of the 1905 Act, the presidential proclamation, the pertinent legislative history and the subsequent treatment of the subject lands convinces us that the forest reserve lands are not part of the reservation. No express language of termination of Indian jurisdiction over the Forest Service lands or an express extinguishment of the reservation boundaries was required. As we noted previously

the Supreme Court has held that the "clear language of express termination" is not a required talisman for termination or disestablishment. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 588 n. 4, 97 S.Ct. 1361, 1364 n. 4, 51 L.Ed.2d 660. The authority was present and was exercised to so change the land status from reservation lands to public forest reserves. The administrative authority over the lands was transferred from the Secretary of the Interior to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected the Forest Service lands to an entirely different regulatory regime. By transferring of reservation status to the status of the Forest Service lands thus for public use and by shifting the administrative authority over them, Congressional intent to remove the lands from the reservation is clearly evidenced.

Our holding that Indian jurisdiction is inconsistent with the land's status as forest reserve land is consonant with recent holdings by the Court of Claims and the Ninth Circuit. Both courts held that the designation of land as a forest reserve is itself effective to extinguish Indian title. *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1386, 1391-93 (Ct.Cl.); *United States v. Gemmill,* 535 F.2d 1145 (9th Cir.). The Ninth Circuit went on to find that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the . . . Indians for these lands." *Id.* at 1149. The Utes received $1,217,000.00 in compensation. The situation before us is very similar as Congress added to a forest reserve by removing lands from an Indian reservation and later compensating the Indians for the lands. The trial court was correct in finding that the 1,010,000 acres withdrawn pursuant to the July 14, 1905 presidential proclamation were no longer part of the Uintah reservation.

The Strawberry River Reclamation

The third major part of the 1905 Act authorized the President before the reservation was opened to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." President Roosevelt withheld from disposal 56,000 acres along the Strawberry River for reclamation purposes pursuant to that authority in August 1905. Presidential Proclamation of August 3, 1905, 34 Stat. pt. 3, 3141.

Five years later, Congress compensated the Utes for the Strawberry River lands and clearly extinguished any Indian interest in the lands by providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished, and the title, management and control thereof shall pass to the owners of the lands irrigated from said project . . . ." Act of April 4, 1910, 36 Stat. 269, 285.

Neither side disputes the trial court's holding that the reservation was diminished to the extent of the 56,000-acre Strawberry River withdrawal.

The withdrawal of lands for the Strawberry River irrigation project does not give rise to any implication that the unallotted lands remained part of the reservation. The Strawberry River lands were set apart and reserved on August 3, 1905, over three weeks *prior* to the opening of the reservation on August 28, 1905. Affirmative action to remove the Strawberry River lands from the reservation was then necessary because the reservation had not yet been opened. The Strawberry River withdrawal has no bearing on the status of lands which were subsequently to be opened to the public domain.

III. CONCLUSION

We summarize our conclusions as follows:

1. We affirm the trial court's holding that the original Uncompahgre reservation was disestablished by Congress pursuant to the Act of June 7, 1897 and no longer exists.

2. We affirm the trial court's holding that prior to August 28, 1905, the original boundaries of the Uintah Valley Indian reservation were diminished by Congress through the withdrawal of the Gilsonite Strip in 1888, by the withdrawal of 1,010,000 acres subsequently made part of the Uintah National Forest, and by the withdrawal of approximately 56,000 acres for the Strawberry River irrigation project.

3. We affirm the trial court's finding that the 510,000-acre Hill Creek Extension was incorporated within the Uintah and Ouray Indian reservation.

4. As to the Uintah Valley reservation, we must reverse the holding of the trial court that the unallotted lands at the opening remained part of the reservation. Instead it is our judgment that the then unallotted lands lost all reservation status, became part of the public domain, and not within the reservation for any purpose when the reservation was opened, subject only to the special tracts herein discussed set apart for specific uses before the land was opened, and subject to valid mineral claims specifically provided for in the Acts of 1902, 1903, 1904 and 1905 and valid claims made under the general mining laws.

IT IS SO ORDERED.

WILLIAM E. DOYLE, Circuit Judge, will write a separate dissenting opinion.

WILLIAM E. DOYLE, Circuit Judge, dissenting.

PRELIMINARY STATEMENT
DISCUSSION OF ISSUES

I respectfully dissent, particularly with respect to the decision determining that the Uintah lands have become

a part of the public domain. In essence, I favor the position that was taken by the District Judge Jenkins, who generally ruled that the Uintah Reservation and its lands remain the property of the tribes that are involved. I would, however, reverse the trial court's determination that the withdrawal of the Uintah National Forest means that the Indians lost title to that land.

The trial court recognized that concurrent with the drive to open up the Uncompahgre Reservation there was also an effort to negotiate an agreement with the Uintah and White River bands. *Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072, 1111 (D.Utah 1981). This was short of a return to the public domain. It would have provided for the *allotment* of their lands and for the cession of the unallotted surplus acreage. Bills were introduced in Congress in 1894 providing for the allotment and opening of both reservations. In fact contained in H.R. 6557 there were provisions included in the Indian Appropriations Act for 1894 §§ 20-23. But it is important to note that under the provisions of the Act distinction was made between the legislative approach to the Uncompahgre Reservation and the approach to the Uintah Valley Reservation.

With respect to the Uncompahgre Reservation a commission was appointed to proceed directly with the allotment of the Uncompahgre lands but a separate provision treated the Uintah Reservation Indians. The commission was directed in section 22 to negotiate with those Indians "residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians." The object was merely to obtain the consent of such Indians to such relinquishment and for the acceptance by said Indians of the allotments and severalties of lands within their Reservation. The commissioners were directed to report on an agreement made by them with the Indians

which agreement would become operative only when ratified by Act of Congress.

It was said in the House report that: "The rights of the Indians on the Uintah Reservation differ from those of the Indians upon the Uncompahgre Reservation. The Uncompahgre Indians have no title to any of the lands within the reservation, nothing more than the privilege of temporary occupancy." House Report, No. 660, LD30, at 1. The Indians of the Uintah Reservation, the Assistant Attorney General found, were the owners of the land within the Reservation because in the Act of Congress of May 5, 1964 a provision was made that the land within the Uintah Reservation should be " 'set apart for the permanent settlement and exclusive occupation of the Indians' . . . to make available for settlement any portion of the lands within the Uintah Reservation." *Id.*, at 2-3. The report said: "it is first necessary to obtain the consent of the Indians residing thereon."[1] The bill provided that the commissioners appointed "shall treat with the said Indians for the purpose of obtaining a relinquishment of their title to any lands not needed for allotment to Indians." The Supreme Court in *Mattz v. Arnett*, 412 U.S. 481, 496, 93 S.Ct. 2245, 2253, 37 L.Ed.2d 92 (1973) made it plain that the effort in the opening of the reservation in that case was not to do away with the continued reservation status. The object was to arrange for a system under which Indians could own land on the reservation with the federal government acting as guardian and trustee for the Indians which would be regarded as beneficial to the development of its wards.

In contrast to this, as to the Uncompahgre Reservation which was directly south of the Uintah Reservation, the object of Congress was particularly vague. However, the

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[1] This consent in this instance is of real importance because it recognizes that the rights of the Uintah Tribe are substantial and that they actually own the land.

first duty of the Commission was to deal with the Uncompahgre Indians according to the Act of 1894. Actually the work of the Commission, shown by the report of the Senate, did not make any progress at all with respect to the Indians of the Uintah Reservation. The majority in the present appeal feel that Congress was aware that the reservations were to be terminated by legislation that expressly restored the Indians' land to the public domain. The legislative history of the 1905 Act showed that as to the Uintah Reservation the Senate purposely voided the earlier acts which would have affected the Reservation and rejected the 1905 House proposals that contained express "restored to the public domain" language. Thus the 1905 Act has to be read as opening the Reservation in only a limited way. Since there was no intent to terminate it entirely, no such intention was shown, hence it cannot be implied.

The majority opinion disagrees with the trial court's extensive consideration of the 1905 Act's basic objective. The majority opinion argues that the Act's development was merely an extension of the original 1902 Act and did not repeal the earlier legislation. Thus the 1902 Act's termination language ought to apply to the Uintah Reservation. In actual practice it never was so regarded by the Congress or by the Department of Interior. Meanwhile 80 years passed since the enactment and no change has been made to this day.

The majority opinion also has cited other Indian reservation cases decided by the Supreme Court. The majority opinion states that the operative language in the 1905 Act opening the Uintah's land to non-Indian settlers, "under the homestead and townsite laws," is equivalent to "restored to the public domain;" the only phrase that the Supreme Court has recognized as terminating reservations that were not expressly ceded by a tribe. I submit that a proper reading recognizes a vast difference between restoring land to the public domain and a partial opening of

the Reservation for homestead and townsite purposes. The slight opening here was for homestead and townsite purposes. Neither the Reservation or its lands generally were disturbed. I have no criticism of the Act of Congress which opened the land to non-Indian settlors for homestead purposes; this is consistent with continuation of the Reservation identity as well as the unallotted lands. Here there was no intention of Congress to deprive the Indians of their land.

It is highly significant that the position taken in this case by the United States and the State of Utah support the position of the Indians in this legislation. I regard this as highly cogent. If the Uintah Reservation were ripe for return to the public domain the Government would not be arguing in favor of the Ute tribes.

The only litigant in this case which takes issue with the position of the Tribes is the *cities* and *counties*. This is due to the fact that there are two cities which have grown up within the boundaries of the Reservation. The presence of these cities and counties is insignificant with respect to the issue which is here being considered. They have no minimal standing to try to strip the Tribes of their land.

This present action does not seek to interfere with the mentioned cities and counties. These are individual modifications but they go no further than the two counties and the two cities within the counties. Once again the State of Utah has also fully endorsed the position of the Tribe in this case. The State of Utah chose to submit the trial court's opinion as its brief rather than make "unsupportable arguments" against that decision.

What is at stake then in this appeal is jurisdiction, civil, criminal, regulatory and taxation, over Indians and over non-Indians who have transactions with Indians in the disputed lands, together with the authority of the United States to administer the area and part of the Uintah Reservation. *See DeCoteau v. District County Court*, 420 U.S.

425, 427 n. 1, 95 S.Ct. 1082, 1084 n. 1, 43 L.Ed.2d 300 (1975).

Indian country has been defined as dependent Indian communities; the State of Utah may have had jurisdiction over the predominantly non-Indian communities of Duchesne and Roosevelt even though, in the trial court's decision, they would be geographically located within the Uintah Reservation. 18 U.S.C. § 1151(b) (1976); *Weddell v. Meierhenry,* 636 F.2d 211, 213 (8th Cir.1980), cert. denied, 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981).

The important point is that, other than the two cities and counties mentioned, the remainder of the property that is in dispute here has had continuous recognition as Indian country and it continues to be so recognized. The majority opinion also recognizes that the Indians who reside in this area have certain claims, even though some of them are not members of the Uintah Tribe, but the Tribal members have claims to tracts for grazing, etc. The allotments made to individual Indians totals about 360,000 acres. There are about 217,000 acres which have been restored to the Indians in 1940. A fact that is recognized by the trial court is that the Hill Creek extension of about 500,000 acres is recognized as the property of the Indians. So, the fact that there have been homestead rights to non-Indians within the Reservation cannot be regarded as too significant in relationship to termination of the reservation or the tribal lands. The majority opinion recognizes that the reserves and the allotments have at all times been referred to as being within the Ute Reservation or the Uintah and Ouray Reservation "and this explains the occasional use of the terms when additions were made extending the Reservation or the Reservation boundaries."

Other cases in which courts have upheld a reservation's continuing existence have had far stronger indications of congressional intent to end the reservations on the face of the opening acts than are present in our case. Here

there is a dearth of such evidence. In *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), sections in the opened lands were reserved for schools. That action did not indicate any intent to return to the public domain. The Ninth Circuit denied the kind of relief which is sought here. This partial assumption of control did not terminate the Reservation. There was not a return to the public domain. *See Rosebud*, 430 U.S. 584, 611-14, 97 S.Ct. 1361, 1375-76, 51 L.Ed.2d 660 (1977).

This is another indication that Congress is at liberty to provide for other uses of the land within the Reservation without disturbing the Reservation as a legal entity.

In *Kootenai Tribes* opening legislation also extended a federal ban on liquor to the opened lands; something Congress would have thought necessary if it intended to terminate the Flathead Reservation because the Indians then could no longer have been in "Indian country" where intoxicants were automatically banned. *Id.* Notwithstanding this evidence of Congress' intent to end the Flathead Reservation, the absence of express termination language on the face of the act together with the lack of cession agreement, convinced the Ninth Circuit that the reservation had not been disestablished. 665 F.2d at 955-56. Circuit Judge Pregerson.

Another facial aspect which ordinarily tends to show that Congress intended to terminate a reservation is the provision for a sum certain payment to the Indians for their land. *DeCoteau v. District County Court*, 420 U.S. 425, 448, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975). A provision to pay all members of the tribe from the uncertain proceeds from future sales of parcels to settlers, however, has indicated that Congress did not intend to terminate a reservation. *Mattz, supra*, 412 U.S. at 504, 93 S.Ct. at 2257; *Seymour v. Superintendent*, 368 U.S. 351, 355-56, 82 S.Ct. 424, 427, 7 L.Ed.2d 346 (1962); *Ash*

Sheep Co. v. United States, 252 U.S. 159, 164-66, 40 S.Ct. 241, 242, 64 L.Ed. 507 (1919).

The 1905 Act having to do with the Uintah Reservation provided for uncertain payment from sale proceeds rather than a sum certain payment. That is to be regarded as a further indication on the face of the 1905 Act that Congress intended the Uintah Reservation to remain Indian country.

The majority consideration, at page 32, discussing the Gilsonite Strip withdrawal as being support for its conclusion that entry limitations are not inconsistent with termination, is plainly misplaced. The Gilsonite Strip Withdrawal Act expressly declares the withdrawn land to be restored to the public domain. Moreover, like the reservation termination in *Rosebud*, the Gilsonite Strip withdrawal followed the Indians' *express cession* of that small strip of land for asphalt mining because its barren nature made it useless to them. Act of May 24, 1888, 25 Stat. 157. The majority opinion does not mention this cession. Its references at pp. 23 and 25 to the applicable legislation are not correct. They are at odds with the condition. This was a special withdrawal that was agreed to by the Tribe; thus, there is no possibility of an implicit conclusion that there was a termination of tribal ownership of the remaining land. The trial court ably details the contrast between the tribes' complicity regarding the Gilsonite Strip withdrawal and their steadfast refusal to cede any more of their reservation. 521 F.Supp. at 1113. Without the Indians' cession agreement to provide a baseline purpose of disestablishment, the entry limitations insisted upon by the Senate in 1905 have undeniable significance.

In summary: there is nothing on the face of the 1905 Act which supports the conclusion that Congress intended to terminate the Uintah Reservation. In cases involving similarly limited reservation openings of lands that were not expressly ceded by the Indians, the Supreme Court

and other circuit courts have held without exception that the opened areas remained Indian country.

Consideration of Legislative History

In *Mattz v. Arnett, supra,* the Supreme Court acknowledged that Congress has the power to terminate an Indian Reservation unilaterally. Termination, however, does not occur unless the act opening a reservation or that act's development shows the clear intent on the part of Congress to end entirely the land's reservation status. "A congressional determination to terminate must be express on the face of the Act or be clear from the surrounding circumstances and legislative history." 412 U.S. at 505, 93 S.Ct. at 2258. Subsequently, the Court has added that the required clarity of purpose can be disclosed if a tribe's agreement to cede its land is incorporated in a series of acts that show an "unmistakable baseline purpose of disestablishment." *Rosebud, supra,* 430 U.S. at 592, 97 S.Ct. at 1366.

In the present situation there once was an act that showed the intent of Congress to open the Uintah lands and to eliminate the tribe's and the United States's authority over the effected territory. That was the so-called 1902 Act which would have "restored [the Reservation] to the public domain." The catch was that it was subject to *a majority of the adult male Uintah and White River Utes giving their consent.* Act of May 27, 1902, Ch. 88, 32 Stat. 245, 263-64. This consent was *never* given. Clearly in 1902 some members of Congress may have considered termination of the Reservation, *if the Indians agreed.* As opposed to the Uncompahgre's uncertain claim to their lands, the Uintah and White River bands possessed title to the lands within their Reservation. Thus, their consent was seen as a necessary precondition to an opening of that land. *See Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072, 1111 (D.Utah 1981). *Rosebud is not a parallel situation.*

At no time did the Uintah and their companion Tribe, the White River Utes, consent to the opening of their Reservation. *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), made Indian cession of reservation lands unnecessary. The Court there held that Congress could unilaterally open and allot reservation lands. Notwithstanding that, unlike the circumstances in *Rosebud, supra,* which the majority points to as its principal authority, the fact that the tribes here never ceded their lands directly or indirectly means that we cannot legitimately say that there was ever an "unmistakable baseline purpose" to terminate the Reservation.

To compare the situation here with that in the *Rosebud* case in which a majority of the effected tribe first agreed to the proposed diminishment of the reservation, then consistently ratified subsequent revision in the law intending to enact that agreement, is a contrast which argues in favor of the position of this Tribe.[2] For its part, the only changes Congress made in subsequent acts were to "the form of, and responsibility for, payment." 430 U.S. at 595, 97 S.Ct. at 1367. Despite these payment revisions, the original agreement's language which was precisely suited to disestablishment, remained intact in all of the cases that were considered. 430 U.S. at 597, 97 S.Ct. at 1368. The

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[2] In Article I of the original act opening the Rosebud Reservation the tribe agreed to the following: "The said Indians belonging to the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted." . . . *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 591 n. 8, 97 S.Ct. 1361, 1365 n. 8, 51 L.Ed.2d 660 (1976).

The majority opinion in *Rosebud* also notes that: "The written consent of a majority of the Tribe was obtained prior to the 1904 and 1907 Acts, . . .; no written consent was obtained prior to the 1910 Act, but the 'practically unanimous' concurrence of the Indians was reported." 430 U.S. at 587 n. 2, 97 S.Ct. at 1363 n. 2 [citations omitted].

factual contrast between *Rosebud* and our case is, to say the least, great.

Similarly, in *DeCoteau v. District County Court, supra,* there was a consistent readiness to cede tribal lands which was a key factor. The *DeCoteau* opinion is relied upon by the majority opinion in *Rosebud* in support of its conclusion that the Rosebud Indian Reservation agreements showed an unmistakable baseline purpose of disestablishment. To be noted also is the fact that Congress' ratification of the *DeCoteau* cession agreement states that "All this land is opened by this bill to settlement as part of the public domain." 420 U.S. at 441, 95 S.Ct. at 1091. The finding of termination in *DeCoteau* was also supported by the fact that there was no indication of a legislative retreat from earlier attempts to vacate a reservation, as in *Mattz.* And finally in *DeCoteau* the cession agreement provided for a sum certain payment. 420 U.S. at 448-49, 95 S.Ct. at 1094-95.

The trial court considered all of the legislative history in detail and was convinced that "[n]othing in the legislative history of the 1905 Act approaches a clear expression of congressional intent to disestablish the Uintah Reservation." 521 F.Supp. at 1132. That conclusion draws support from the Senate's express rejection of the 1905 House amendment to the 1902 Act which provided that surplus unallotted lands would be restored to the "public domain." As said by the trial court, Senators Smoot and Teller insisted that non-Indians be allowed to enter the Uintah Reservation only under the Homestead and Townsite laws.[3]

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[3] Indian Appropriation Bill, 1906; Hearings on H.R. 17474 before the subcommittee on Indian Affairs, 58 Cong. 3d Sess. (1905). The bill as passed incorporated Senators Smoot and Teller's limited entry provision, not the full entry that the 1902 Act contemplated by seeking to restore the Reservation to the public domain. 39 Cong.Rec. 3522 (1905); *see also* Remarks of Cong. Howell, 39 Cong.Rec. 1181-82 (1905).

Congress made a "clear retreat" from its position as expressed in the 1902 Act. As was the case in *Seymour* and *Mattz:*

> The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

368 U.S. at 356, 82 S.Ct. at 427; 412 U.S. at 497, 93 S.Ct. at 2254.

In considering the circumstances surrounding the Uintah Reservation and the subsequent administrative treatment as discussed at quite some length in the trial court's opinion, there is no necessity for us to elaborate on it. We have accurately evaluated the governing authorities. Again, contrary to the conclusions expressed in the majority opinion, there emerges from this study the conclusion that the Indians, non-Indians, the state and federal governments have treated the land as a continuing reservation and not public land. Even if we were to agree with the majority's conclusion that there is "simply no consistent, clear and uniform identification of the reservation's status in the subsequent legislative record," there is ample evidence in the record of the surrounding circumstances in support of the conclusion that Congress never intended to terminate the Reservation or return its lands to the public domain. In any event it is for the cities and counties to prove that Congress had a dismantling intention.

The majority quotes the presidential proclamation of July 14, 1905 and states that this proclamation's "references and adoption of the terms of the 1902 Act" shows that the earlier act's termination language was incorporated in the 1905 Act. However, a reading of the 1905 Act fails to bring out this fact nor is there any public domain reference to the Uintah Reservation in that act.

Considered in its best light then the strongest part of the majority evidence supports the proposition that any time Congress expresses an intent to restore a reservation to the public domain there would thereupon be an underlying baseline purpose of disestablishment and that furthermore no alteration in congressional intent could come about. Under the majority's view, each change would merely adopt the earlier proposal. The Supreme Court has not accepted any such argument. Moreover property is not to be taken from its owners so easily. The Supreme Court has concluded that congressional intent can change and that we should look to the last expression of that intent to determine whether the Congress that actually opened a reservation meant to terminate it as well:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.

Mattz, supra, 412 U.S. at 504, 93 S.Ct. at 2257 [footnote omitted].

A somewhat similar recent decision was decided by the Ninth Circuit. In the *Kootenai Tribes* case mentioned above, there was a congressional retreat from an opening act that would have terminated the Flathead Reservation. *Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951 (9th Cir. 1982). But there was a failure in that case to obtain the tribe's consent to cession. Congress had enacted opening legislation which provided that after allotment to the Indians, the surplus lands "shall be disposed of under the general provision of the homestead, mineral, and townsite laws of the United States." 665 F.2d at 957. The obvious differences in Congress' approach in the subse-

quent act in *Rosebud,* which "explicitly incorporated, and purported to amend and ratify, a 1901 cession agreement," and in the act which allowed only limited non-Indian settlement on the Flathead Reservation caused the Ninth Circuit to conclude that "it is mere speculation to suppose that Congress in 1904 must have intended to effect a termination simply because it had sought to negotiate one several years earlier." 665 F.2d at 958 [footnote omitted].

In our case evidence of subsequent negotiations is not shown. As in *Kootenai Tribes,* it cannot be said that merely because Congress may have intended to effect a termination, because it had sought to negotiate one once, that it intended to effect a termination in the actual opening legislation. As Judge Pregerson, speaking for the Ninth Circuit, said in the opinion in the *Kootenai Tribes* case "it is mere speculation". Here also it is speculation at best to suppose that Congress must have intended to effect a termination growing out of the fact that first it sought to negotiate one.

CONCLUSION

From a consideration of the trial court's opinion, we are convinced that it is based on a careful and painstaking review of the relevant legislation and history. The trial court applied principles of law to analysis of the facts in accordance with Supreme Court precedent. I join in the majority's affirmance of parts of the trial court's decision but dissent from all of the remainder of the majority opinion; that which reverses the trial court's judgment that the Uintah Reservation and the lands within it was not terminated by the 1905 Act or any other action. To hold otherwise would run counter to the detailed decision of the trial court and the precedents which favor the Indians. The majority's effort to piece expressions together in order to find congressional intent to terminate is not persuasive. To terminate the Uintah Reservation and return the lands to the public domain on the showing in this record would

be an injustice of great magnitude. Actually the only parties who seek to bring about this termination of ownership are the two cities that are involved and no doubt they have motives of their own. It is possible that there are minerals to be mined in this area. However, this dissent grows out of a sincere belief that the Indian Tribes involved are threatened with a gross injustice.

Finally, we return to the fact that the United States has never undertaken a termination of this Reservation or Indian ownership of these lands. Throughout its history and at the present time the United States has recognized the continued existence of the tribe and the tribe's ownership of the lands. True, there have been limited modifications allowing entries, none of which have purported to bring about any substantial change. Indeed, even at the present time and *in this case* the United States has endorsed the Indian position.

The United States Government has on this appeal urged an affirmance of the judgment of the district court with the exception of the ruling with respect to the forest lands. This writer views the ruling on the ownership of the forest lands in the same way. It is a condition brought about by the Forest Service (Dept. of Agriculture) undertaking the management of the forest. This has not changed the ownership of the lands or the timber. The important fact is that the United States is on the side of the tribes. This alone is opposed to the existence of any evidences of termination or any prior effort to void the Reservation or to return the land to public domain status.

APPENDIX D

United States District Court,
D. Utah, C. D.
June 19, 1981.

Civ. No. C 75-408.

The UTE INDIAN TRIBE, Plaintiff,
v.
The STATE OF UTAH, defendant in intervention, Duchesne County, a political subdivision of the State of Utah, Uintah County, a political subdivision of the State of Utah, Roosevelt City, a municipal corporation, and Duchesne City, a municipal corporation, Defendants,

United States of America, Amicus Curiae,

Paradox Production Corporation, a Utah corporation, Amicus Curiae.

Indian Tribe brought action seeking declaratory and injunctive relief establishing exterior boundaries of reservation. The District Court, Jenkins, J., held that: (1) Uncompahgre Reservation had been disestablished; (2) Uintah and Ouray Reservation had not been disestablished, except as to lands removed for national forest purposes and for purposes of the Strawberry Reservoir Project; (3) Court would not issue advisory opinion as to validity of Tribe's Law and Order Code; and (4) need for injunctive relief was not demonstrated.

Order accordingly.

Stephen G. Boyden, Boyden, Kennedy & Romney, Salt Lake City, Utah, Martin E. Seneca, Jr., Washington, D. C., Larry J. Echohawk, Richard Hill, Scott Pugsley, Salt

Lake City, Utah, Daniel H. Israel, Native American Rights Fund, Boulder, Colo., for plaintiff Ute Indian Tribe.

Dallin W. Jensen, Michael M. Quealy, Denise Dragoo, Asst. Attys. Gen., State of Utah, Salt Lake City, Utah, for defendant State of Utah.

David L. Wilkinson, Atty. Gen., Richard Dewsnup, Asst. Atty. Gen., State of Utah, Clifford L. Ashton, Van Cott, Bagley, Cornwall & McCarthy, Sp. Asst. Attys. Gen., Salt Lake City, Utah, for defendants.

Tom G. Tobin, Tobin Law Offices, P. C., Winner, S. D., David Albert Mustone, Washington, D. C., for Duchesne & Uintah Co.

Whitney Hammond, Uintah County Atty., Vernal, Utah, for Uintah County.

Lynn Mitton, Roosevelt City Atty., Roosevelt, Utah, for Roosevelt City.

Francis M. Wikstrom, U. S. Atty., District of Utah, Salt Lake City, Utah, Anita Vogt, Dept. of Interior, Kenneth Marra, Land and Natural Resources Division, U. S. Dept. of Justice, Washington, D. C., for U. S. as amicus curiae.

Stewart M. Hanson, Jr., Salt Lake City, Utah, for Paradox Production Corp.

Lance Wilkerson, Duchesne, Utah, Dennis Draney, Roosevelt, Utah, for Duchesne Co.

JENKINS, District Judge.

The Ute Indian Tribe filed a complaint with this Court on October 15, 1975, seeking declaratory and injunctive relief establishing the exterior boundaries of the Uintah and Ouray Reservation, defining the force and effect of the Tribe's Law and Order Code within those boundaries, and restraining the defendants from interfering with the

enforcement of that Code.[1] The Tribe, a federally recognized, sovereign Indian tribe,[2] operates under a constitution and by-laws adopted in 1936 and approved by the Secretary of the Interior in 1937.[3] Article I of the tribal constitution defines the territory claimed by the Tribe for jurisdictional purposes:

> The jurisdiction of the Ute Indian Tribe of the Uintah and Ouray Reservation shall extend to the territory within the original confines of the Uintah and Ouray Reservation as set forth by Executive Orders of October 3, 1861 and January 5, 1882, and by the Acts of Congress approved May 27, 1902, and June 19, 1902, and to such other lands without such boundaries as may hereafter be added thereto under any law of the United States, *except as otherwise provided by law.* [Emphasis added.]

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[1] This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1362:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Before it was served with process as a defendant, the State of Utah filed a motion to intervene on November 26, 1975, and a subsequent motion to quash the service of process accomplished on December 17, 1975. On January 15, 1976, this Court granted both motions. Since by its motion to intervene, the State waived its Eleventh Amendment immunity in this action, there is no further need to consider that jurisdictional issue. See *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 276-82, 79 S.Ct. 785, 787-790, 3 L.Ed.2d 804 (1959). Venue is proper. 28 U.S.C. § 1391(a) (1976).

[2] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 143, 100 S.Ct. 2069, 2075, 65 L.Ed.2d 10 (1980).

[3] The tribal constitution was adopted pursuant to Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476. Additionally, the Tribe is chartered as a federal corporation pursuant to § 17 of that Act, 25 U.S.C. § 477.

Among the powers vested in the Tribal Business Committee, the Tribe's elected governing body, are the following:

Article VI—Powers of the Tribal Business Committee

Section 1. Enumerated powers.—The Tribal Business Committee of the Uintah and Ouray Reservation shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and By-laws, and subject to review by the Ute Bands themselves at any annual or special meeting:

* * * * * *

(h) To levy taxes upon members of the Ute Indian Tribe of the Uintah and Ouray Reservation, and to require the performance of community labor in lieu thereof, and to levy taxes and license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the Reservation.

(i) To exclude from the territory of the Uintah and Ouray Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior.

* * * * * *

(j) To enact resolutions or ordinances, not inconsistent with Article II of this Constitution governing adoption and abandonment of members, and to keep at all times a correct roll of the members of the Ute Indian Tribe of the Uintah and Ouray Reservation.

(k) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Ute Indian Tribe of the Uintah and Ouray Reservation, and pro-

viding for the maintenance of law and order and the administration of justice by establishing a Reservation Indian Court and defining its duties and powers.
(l) To safeguard and promote the peace, safety, morals and general welfare of the Ute Indian Tribe of the Uintah and Ouray Reservation by regulating the conduct of trade and the use and disposition of property upon the Reservation, provided that any ordinance directly affecting non-members of the Reservation shall be subject to review by the Secretary of the Interior.
(m) To charter subordinate organizations for economic purposes, and to regulate the activities of co-operative associations of members of the Ute Indian Tribe of the Uintah and Ouray Reservation by ordinance, provided that any such ordinance shall be subject to review by the Secretary of the Interior.
(n) To regulate the inheritance of property, real and personal, other than allotted lands, within the territory of the Uintah and Ouray Reservation, subject to review by the Secretary of the Interior.
(o) To regulate the domestic relations of members of the Ute Indian Tribe of the Uintah and Ouray Reservation by ordinances which shall be subject to review by the Secretary of the Interior.
(p) To provide for the appointment of guardians for minors and mental incompetents by ordinances or resolutions which shall be subject to review by the Secretary of the Interior.

* * * * * * *

For many years, it seemed to the Ute's non-Indian neighbors that these powers, as well as others, lay dormant as far as non-Indian affairs were concerned. To many, the concept of Indian tribal government seemed wholly irrelevant to their businesses and daily lives. Over those same years, however, the Ute Indian Tribe did not remain

passive. The Utes, with the support and encouragement of their trustee, the United States government, have made continuous efforts to improve the sophistication and effectiveness of their tribal institutions in response to changing times and circumstances.[4] Naturally, as the Utes have gained the economic wherewithal to do so, they have sought a greater share of autonomy and control over their own lives and community affairs. It was inevitable that this quest for tribal autonomy would find expression in the promulgation of tribal law.[5]

The Tribe operated a tribal government and an Indian court for many years prior to 1975.[5A] As tribal operations expanded and the demand on tribal institutions increased, the Tribe sought to recodify and expand its growing body of ordinances, resulting in the enactment and publication of the Law and Order Code of the Ute Indian Tribe (hereinafter "Ute Law and Order Code") which was approved by the Secretary of the Interior through the Phoenix Area Director of the Bureau of Indian Affairs, Trial Transcript at 55 (Testimony of Wm. F. Streitz), and became effective on September 15, 1975.[6]

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[4] See F. O'Neil & J. Sylvester, eds., Ute People: An Historical Study 113-15 (3d ed. 1970); Ten Year Development Program for the Ute Indian Tribe (1957), JX No. 465.

[5] *E. g.*, Trial transcript at 44-87 (Testimony of Wm. F. Streitz).

[5A] See Ute Indian Tribal Court, 1964 Report, Plaintiff's Exhibit 3.

[6] The statement of tribal policy introducing the new code is enlightening as to the purposes intended to be served:

§ 1-2 1. *Jurisdiction—Tribal Policy.*

It is hereby declared as a matter of Tribal policy and legislative determination, that the public interest and the interests of the Ute Indian Tribe demand that the Tribe provide itself, its members, and other persons living within the territorial jurisdiction of the Tribe as set forth in Article I of the Constitution of the Ute Indian Tribe with an effective means of redress in both civil and criminal cases against members and non-Tribal members who through either their residence,

Promulgation of the Ute Law and Order Code raised immediate protest from the defendant municipalities, Duchesne and Roosevelt, and defendant Duchesne County, all of which are within the original boundaries of the Uintah Indian Reservation.[7] The defendants complained that they were wrongfully included within the territorial jurisdiction of the Ute Tribe under the Ute Law and Order Code[8] and

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presence, business dealings, other actions or failures to act, or other significant minimum contacts with this Reservation and/or its residents commit criminal offenses against the Tribe or incur civil obligations to persons or entities entitled to the Tribe's protection.

This action is deemed necessary as a result of the confusion and conflicts caused by the increased contact and interaction between the Tribe, its members, and other residents of the Reservation and other persons and entities over which the Tribe has not previously elected to exercise jurisdiction. The jurisdictional provisions of this Law and Order Code, to insure maximum protection for the Tribe, its members and other residents of the Reservation, should be applied equally to all persons, members and non-members alike.

[7] See *e. g.*, Exhibit I-1A (map).

[8] The territorial extent of tribal jurisdiction is defined by Ute Law and Order Code § 1-2-2 (1975) as follows:

> *Territorial Jurisdiction.*
>
> (1) The Jurisdiction of the Courts of the Ute Indian Tribe shall extend to the territory within the original confines of the Uintah and Ouray Reservation as set forth by Executive Orders of October 3, 1861, and January 5, 1882, and by the Acts of Congress approved May 27, 1902, June 19, 1902 and March 11, 1948, and to such other lands without such boundaries as have been or may hereafter be added to the Reservation or held in trust for the Tribe under any law of the United States or otherwise.
>
> (2) The jurisdiction of the Courts of the Ute Indian Tribe shall extend beyond the territorial limitation set forth next above, to effectuate the jurisdictional provisions set forth below, to the greatest extent permissible by law.
>
> [The personal jurisdiction asserted by the Tribe is expressed in expansive terms by § 1-2-3.]

The *subject-matter* jurisdiction of the Tribe, in contrast, is carefully

officials of the defendants urged their constituents to resist the enforcement of the new code. The State of Utah complained that its authority was likewise impaired.[9]

The Tribe, faced with mounting opposition to the exercise of its jurisdiction, commenced the above-entitled action in this Court against the named governmental defendants. The State of Utah intervened as a defendant and the United States of America and Paradox Production Corporation have subsequently entered these proceedings as *amici curiae*. By stipulation of the parties in the Pretrial Order, Uintah County, another political subdivision of the State of Utah, was joined as a defendant.[10]

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limited:

> § 1-2-5. *General Subject Matter Jurisdiction; Limitations.*
>
> Subject to any contrary provisions, exceptions, or limitations contained in either federal law, or the Tribal Constitution, the Courts of the Ute Indian Tribe shall have jurisdiction over all civil causes of action, and over all offenses prohibited by this Code *except the Courts of the Ute Indian Tribe shall not assume jurisdiction over any civil or criminal matter which does not involve either the Tribe, its officers, agents, employees, property or enterprises, or a member of the Tribe, or a member of a federally recognized tribe, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of the Tribe or its members may be directly or indirectly affected.* [Emphasis added.]

Far from attempting a wholesale appropriation of governmental authority in the Uintah Basin, the Ute Indian Tribe expressed limitations on its own authority that presaged the latest expression on the subject by the Supreme Court. See *Montana v. United States*, ___ U.S. ___, 101 S.Ct. 1245, 1257, 67 L.Ed.2d 493 (1981). Further, it is interesting to note that at least one defendant municipality had agreed years before to a limited exercise of tribal jurisdiction over Indians within the city limits. See Memorandum of Agreement between Roosevelt City and the Ute Tribe, Jan. 11, 1972, Joint Exhibit No. 476.

[9] See Letter of Governor Calvin L. Rampton to Attorney General Vernon B. Romney of Oct. 14, 1975, attached to Answers to Plaintiff's First Interrogatories, filed April 16, 1976.

[10] By further stipulation it was agreed that "Grand County and/or

I. CLAIMS OF THE PARTIES

To paraphrase the Pretrial Order, the plaintiff Ute Indian Tribe asserts that the Uintah and Ouray Indian Reservation was created by the Executive Order of October 3, 1861,[11] as confirmed by the Act of May 5, 1864, 13 Stat. 63, by the Executive Order of January 5, 1882,[12] and by the Act of March 11, 1948, 62 Stat. 72, and that the original exterior boundaries as thus established continue to exist undiminished for purposes of defining the present boundary of the Uintah and Ouray Reservation. Plaintiff further asserts that all of the lands encompassed by that boundary are "Indian country" as defined by federal statute[13] and that the defendants may not exercise juris-

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Wasatch County, both political subdivisions of the State of Utah, may without objection from the parties, petition the Court to be joined herein as parties" upon conditions. Pretrial Order at 7 (Apr. 2, 1979). Neither county has sought leave to intervene and consequently they are not parties to this case.

[11] Reprinted in I C. Kappler, Indian Affairs: Laws and Treaties 900 (2d ed. 1904) (hereinafter cited as " ____ Kapp. ____ ").

[12] I Kapp. 901. Copies of these Executive Orders and Acts of Congress are annexed hereto in Appendix "A" of this Opinion.

[13] 18 U.S.C. § 1151 (1976) provides:

> Indian country defined.
>
> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian Reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

See *United States v. John*, 437 U.S. 634, 647-49, 98 S.Ct. 2541, 2548-2549, 57 L.Ed.2d 489 (1978).

diction over members of the plaintiff Tribe for any criminal offense committed therein as that jurisdiction is reserved to the United States, or to the Tribe itself,[14] and that the Tribe may exercise the full panoply of its governing powers within those same boundaries free from interference by the defendants.[15]

In defense, all defendants assert that "Indian country" in the Uintah basin is confined to lands held in trust for individual Indians or for the Ute Indian Tribe, and beyond that, the area defined by the Act of March 11, 1948, 62 Stat. 72, more commonly known as the Hill Creek Extension. The State of Utah asserts alternatively that the original Uintah Valley Indian Reservation described in the Executive Order of October 3, 1861, is diminished by national forest and reclamation withdrawals and that diminished area combined with the Hill Creek Extension comprises "Indian country" under tribal and federal

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[14] Language in the Pretrial Order notwithstanding, it has long been held that exclusive federal criminal jurisdiction over Indians in "Indian country" includes all persons found to be "Indian" under federal law, see *United States v. Broncheau*, 597 F.2d 1260, 1262-64 (9th Cir. 1979), *cert. denied*, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1980), notwithstanding specific tribal membership or lack thereof. See *e. g., id.*, at 1263; *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir. 1977), *cert. denied* 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139; *United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) vacated on other grounds, 421 U.S. 944, 95 S.Ct. 1671, 44 L.Ed.2d 97 (1975); *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938). The Ute Law and Order Code § 1-2-5 (1975), *supra* note 8, includes any federally recognized Indian within its subject-matter jurisdiction.

[15] While strictly speaking, 18 U.S.C. § 1151 (1976) defines "Indian country" for the Federal Criminal Code, it is well-settled that its definition applies as well to questions of civil jurisdiction. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2, 95 S.Ct. 1082, 1084, 43 L.Ed.2d 300 (1975), accord, *McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164, 177-78 n.17, 93 S.Ct. 1257, 1265, 36 L.Ed.2d 129 (1973); *Kennerly v. District Court of Montana*, 400 U.S. 423, 424 n.1, 91 S.Ct. 480, 481, 27 L.Ed.2d 507 (1971); *Williams v. Lee*, 358 U.S. 217, 220-22 nn. 5, 6, & 10, 79 S.Ct. 269, 270-271, 3 L.Ed.2d 251 (1958).

jurisdiction. See State's Post-Trial Brief at 55. All defendants assert that the Uncompahgre Reservation, delineated by the Executive Order of January 5, 1882, no longer exists. Implicit in the defense is the issue of the enforceability of the Ute Law and Order Code as against non-Indians, particularly on lands held in fee simple—"fee lands"—rather than on lands held in federal trust for use and occupancy by the Indians—"trust lands".

While plaintiffs seek both declaratory and injunctive relief, no claims for damages have been asserted by any party.

II. PRELIMINARY INJUNCTION

This Court has already granted preliminary equitable relief to a limited extent in the above-entitled action. In an action arising in state court among persons who are not parties to these proceedings, some of the same jurisdictional questions were presented to the state court as are presented here. In a broadly worded opinion in *Brough v. Appawora,* 553 P.2d 934 (Utah 1976), a majority of the Utah Supreme Court held that a state district court had jurisdiction of a tort claim against a member of the Ute Indian Tribe arising from an automobile accident occurring within the original exterior boundaries of the Uintah Valley Reservation as defined by the Executive Order of October 3, 1861.

The plaintiff sought a temporary restraining order and a preliminary injunction forbidding the defendants or their officers, employees, etc. from (1) proceeding to enforce the judgment in *Brough v. Appawora,* or (2) relying on that decision to justify interference with the Tribe's asserted jurisdiction. The temporary restraining order was entered on September 6, 1976, and the preliminary injunction on

October 14, 1976.[16] By its preliminary injunction this Court did not seek to enjoin the state proceedings in *Brough v. Appawora* or otherwise overrule that decision by the Utah Supreme Court, recalling that "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 296, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970). Rather the preliminary injunction was issued to maintain the status quo in this litigation, avoiding potentially destructive conflicts among the parties hereto until this Court was able to conclusively resolve these jurisdictional questions upon the merits.

Of course, this Court is in no way bound to follow the rule of *Brough v. Appawora;* the parties herein were not parties to that case, eliminating any question of *res judicata* or collateral estoppel, see *Kline v. Burke Const. Co.,* 260 U.S. 226, 230, 43 S.Ct. 79, 81, 67 L.Ed. 226 (1922), nor is this Court bound by the doctrine of *stare decisis* to follow state court interpretations of federal law, *Kansas City Steel Co. v. Arkansas,* 269 U.S. 148, 46 S.Ct. 59, 70 L.Ed. 204 (1925).

Any *persuasive* effect the opinion in *Brough v. Appawora* may have had was effectively negated by the United States Supreme Court, which vacated the opinion and remanded "for further consideration in light of *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977)." 431 U.S. 901, 97 S.Ct. 1690, 52 L.Ed.2d 384 (1977). The threat of injury addressed by the preliminary injunction arguably became moot following the Supreme Court's action, and the preliminary injunction shall there-

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[16] By its terms, the preliminary injunction was narrower in scope than was the TRO; the defendants, their officers, employees, etc., were restrained from "exercising or assuming any form of criminal or civil jurisdiction based on the case *Brough v. Appawora,* or otherwise, . . . pending a final determination of this action, . . ."

fore be dissolved upon entry of final judgment in this action.

III. TRIAL

The above-entitled action came before this Court for the purpose of trial without a jury on August 1 and 2, 1979. Testimony was taken from 18 witnesses and more than 800 documentary exhibits were admitted,[17] totaling more than 3,000 pages of text, plus photographs and dozens of maps. Besides giving careful scrutiny to these documents and the record at trial, this Court has studied the extensive pretrial memoranda and post-trial briefs submitted by the parties and the United States as *amicus*, and has examined numerous historical documents authenticated in the discovery process but not included in the compilation of joint exhibits offered at trial, and other learned treaties and historical works that are relevant to this Court's determinations.

IV. HISTORICAL INQUIRY

In large part, the questions to be decided by this Court turn on the discovery of the intent of the United States Congress in the course of its dealings with the Ute Indians and their non-Indian neighbors, particularly as that intent has found expression in numerous statutes. As Chief Justice Marshall announced long ago, "Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived. . ." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1905).

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[17] In this Opinion, documents shall be both described specifically and referred to by their assigned exhibit numbers to avoid confusion. The 485 joint exhibits of the parties shall be cited as "JX [*number*]." The documents included in the Joint Compendium of Legislative Documents shall be cited as "LD [*number*]." Other documents, items, etc. shall be assigned similar designations, *e.g.*, such as those found in defendant's first request for admissions. "DFRA [*number*]."

In this case, this Court has been compelled to assemble and synthesize multiple fragments of a complex era of history in an attempt to reinfuse the words of the old documents we are considering with the weight and meaning they once carried and to do so "courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *United States v. Union Pac. R.R.*, 91 U.S. 72, 79, 23 L.Ed. 224 (1875). Courts in cases such as this one must of necessity refer to that history to resolve the issues before them. See *Missouri-Kansas-Texas R.R. Co. v. Early*, 641 F.2d 856, 857 (10th Cir. 1981). As one distinguished commentator warned years ago: "Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored." N. Margold, *Introduction*, in F. Cohen, Handbook of Federal Indian Law at xxxvii (U.N.M. ed. 1971). In a very real sense history controls the meaning of law in this case.[18]

At the same time, however, neither history nor the law that it creates remain static, fixing words with a particular meaning assigned by the thinking of a particular era. No-

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[18] See Deloria, "Indian Law and the Reach of History," 4 *J.Contemp.L.* 1 (1977). In *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612 (2d Cir. 1981), the United States Court of Appeals for the Second Circuit commented:

> As the Supreme Court has noted with respect to Indian legislation and treaties, "[t]hese instruments . . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 98 S.Ct. 1011, 1019, 55 L.Ed.2d 209 . . . (1978); accord, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 . . . (1979). Certainly, courts should never ignore strong extrinsic evidence which may serve to explain the meaning of statutory enactments, particularly when the statutes are as deeply embedded in American history as are those relevant here.

Id., 638 F.2d at 621 (citations omitted).

tions of jurisdiction, sovereignty, of enlightened governmental policy evolve in a state of flux generated by the changing perceptions and experiences of the people by whom these ideas are defined. Justice requires that courts temper the meaning of the fundamental documents with interpretations that serve the needs of people in circumstances beyond the imagination of those who framed the statutory language decades ago.[19] The architects of the policy of allotting Indian reservation lands in severalty to tribal members in no way foresaw the stubborn survival of American Indians as distinct, cultural and political communities who "cling so tenaciously to their lands and traditional tribal way of life." *Federal Power Comm. v. Tuscarora Indian Nation,* 362 U.S. 99, 142, 80 S.Ct. 543, 567, 4 L.Ed.2d 584 (1962) (J. Black, dissenting). Their concerns over matters of policy seem to have been much more immediate than dictating what would be the precise boundaries of an Indian reservation 80 years later. As Justice Marshall observed in a recent case raising similar issues,

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[19] For example, in *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979), the Supreme Court confronted the problems of enforcement of Indian fishing rights under treaties signed in the 1850's in the context of regulation of an international salmon fishery. Justice Stevens commented that

> In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce .... Unfortunately, that resource has now become scarce and the meaning of the Indians' treaty right to take fish has accordingly become critical.

Id. 443 U.S. at 669, 99 S.Ct. at 3066.

The Court proceeded to decree a practical mathematical apportionment of the resource based upon an equitable reading of the broad purposes of the treaty language. *Id.*, 443 U.S. at 674-685, 99 S.Ct. at 3069-3074.

> Ultimately, what the legislative history demonstrates, as co-counsel for the state has aptly concluded, is that Congress manifested an "almost complete lack of . . . concern with the boundary issue."[20] The issue was of no great importance in the early 1900's as it was commonly assumed that all reservations would be abolished when the trust period on allotted lands expired. There was no pressure on Congress to accelerate this time table, so long as settlers could acquire unused land. Accordingly, Congress did not focus on the boundary question.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 629, 97 S.Ct. 1361, 1384, 51 L.Ed.2d 660 (1977) (J. Marshall, dissenting).

> The task facing this Court is plagued by a similar lack of definitive expression by Congress on the specific boundary issues. The Court must make its own reasoned construction of the relevant statutory language based upon a careful evaluation of multiple factors, namely history, legal doctrine and precedent, public policy, past and contemporary circumstances of people, and common sense. Legal analysis of the evidence and issues in this case is further complicated by the fact that over the years, Congress has changed the rules defining the territorial limits of federal, state and tribal jurisdiction in a reservation context. Historical events that are now material to the question of jurisdiction were not material to the question of jurisdiction at the time those events occurred.

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[20] At his footnote 20, Justice Marshall cites Comment, *New Town et al.: The Future of an Illusion*, 18 S.D.L.Rev. 85, 117 (1973). One author of that Comment, Tom Tobin, is also defense counsel in these proceedings.

For example, "Indian Country" as a jurisdictional concept was first defined in general terms by Congress in the Indian Trade and Intercourse Act of 1834:

> Be it enacted, that all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any state *to which the Indian title has not been extinguished,* for the purpose of this Act, be taken and deemed *Indian country.*[21]

This statutory definition remained in force until it was repealed by the failure to include it in the U.S. Revised Statutes in 1874.[22] However, a number of other federal statutes were retained in the Revised Statutes which still made reference to transactions in "Indian country." *See e. g.,* R.S. §§ 2127-2148, 2150, 2152-2154 (1878). Notwithstanding the repeal of the statutory definition in the 1834 Act, the courts continued to apply the general thrust of that definition in cases arising under statutes which were retained. In *Bates v. Clark,* 95 U.S. 204, 24 L.Ed. 471 (1877), the Supreme Court first dealt with the problem of defining "Indian country" under the Revised Statutes. Jus-

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[21] Act of June 30, 1834, § 1, 4 Stat. 729 (emphasis added). Prior to this time, the Supreme Court had held that lands the Indian title to which had been extinguished by treaty were not "Indian country" for the purposes of the Indian Trade and Intercourse act of 1802, Act of Mar. 30, 1802, 2 Stat. 139. *American Fur Co. v. United States,* 27 U.S. (2 Pet.) 358, 7 L.Ed. 450 (1829). Though sections of that Act referred to "Indian country" or "Indian territory", it made no effort to give a general definition of those terms, choosing instead to delineate a single boundary line which was variable by treaty provision.

[22] See R.S. § 5596 (1878). The 1878 edition of the Revised Statutes corrected certain errors in the first edition and "remained the standard and only official compilation of federal statute law" until 1901. A. Beardsley and O. Orman, Legal Bibliography and the Use of Law Books 77 (2d ed. 1947); See Act of Mar. 2, 1877, § 4, Ch. 82, 19 Stat. 268.

tice Miller, writing for the Court, reviewed the 1834 Act's definition and commented:

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

95 U.S. at 208. In *Bates* the Court found the 1834 definition to be easily applied to the case before it:

> Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of states and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And men have been punished by death, by fines, and by imprisonment, of which the courts who so punished them had no jurisdiction, if the offenses were not committed in the Indian country as established by law. These facts afford the strongest presumption that the Congress of the United States, and the judges who administered those laws, must have found in the definition of Indian country, in the Act of 1834, such an adaptability to be altered circumstances of what was then Indian country as to enable them to ascertain what it was at any time since then.

95 U.S. at 207. Thus it was that the 1834 definition of "Indian country" became a matter of federal common law.[23] The Court continued to apply the title-dependent definition of Indian country set forth in *Bates v. Clark* for a number of years, as in the case of *Ex parte Crow Dog,* 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883), in which Justice Matthews wrote:

> In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of the Indians, . . .
>
> This definition though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of Indian country.

109 U.S. at 561-62, 3 S.Ct. at 399. In *Crow Dog,* the court held Sioux lands within the Dakota Territory to be "Indian country" for jurisdictional purposes. *United States v. LeBris,* 121 U.S. 278, 280, 7 S.Ct. 894, 895, 30 L.Ed. 946 (1887), extended "Indian country" to include lands held under Indian title within the boundaries of a state.

This title-dependent conception of what for jurisdictional purposes comprised "Indian country" governed, or should have governed, the perceptions of persons contemporaneous to the "opening" of the Uncompahgre Indian Re-

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[23] See H. Hart & H. Wechsler, The Federal Courts at the Federal System (2d ed. Bator 1973) at 770: "We will use the term, federal common law, loosely, . . . to refer generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command."

servation in the 1890's and the Uintah Valley Reservation in 1905. *Indian title, rather than reservation boundaries, was the material jurisdictional fact.*[24]

This distinction between "Indian country" and lands within the boundary of a reservation was acknowledged by the Supreme Court in *United States v. Celestine,* 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195, decided in 1909, four years after the Uintah Valley Reservation was "opened" by Congress to settlement. In that case, the Court, referring to the 1834 statute defining Indian country, observed:

> Construing this section, it was decided, in *Bates v. Clark,* 95 U.S. 204, 209, [24 L.Ed. 471] that all the country described in the act as "Indian country" remains such "so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." The section was repealed by Rev.Stat., § 5596. Still, it was held that it might be referred to for the purpose of determining what was meant by the term "Indian country" when found in sections of the Revised Statutes which were reenactments of other sections of prior legislation. *Ex parte Crow Dog,* 109 U.S. 556, [3 S.Ct. 396, 27 L. Ed. 1030]; *United States v. Le Bris,* 121 U.S. 278, [7 S.Ct. 894, 30 L.Ed. 946]. But *the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation yet a*

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[24] As with many generalizations, there is at least one exception: the Seven Major Crimes Act, Act of Mar. 3, 1885, § 9, ch. 341, 23 Stat. 362, extended federal jurisdiction to specified offenses by Indians against Indians and other persons "within the limits of any Indian reservation," rather than within Indian country. See *United States v. Kagama,* 118 U.S. 375, 377-78, 6 S.Ct. 1109, 1110, 30 L.Ed. 228 (1886); *United States v. Celestine,* 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909).

> *reservation is not necessarily "Indian country." The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose.* It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and *when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.*

215 U.S. at 285, 30 S.Ct. at 94 (emphasis added).

Support for any inference on the question of reservation boundaries cannot be drawn blindly from evidence of jurisdictional practice at the time the reservations were opened. Evidentiary exhibits that express contemporaneous opinions on jurisdiction are properly considered only within the context of the governing law as perceived at that time.[25]

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[25] In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), the majority opinion seems to overlook this distinction. In *Rosebud* the majority finds that because Congress expressly extended the operation of the Indian liquor laws to the "opened" areas of the reservation, Congress thought that those lands were no longer within the boundaries of the reservation—a weighty construction of the opening legislation. Of course, the Indian liquor laws addressed themselves to "Indian country", which at that time was defined by land title rather than reservation boundary.

> "[T]he most reasonable inference from the inclusion of this provision is that Congress was aware that the opened unallotted areas would henceforth not be "Indian country," because not in the reservation.

Id., 430 U.S. at 613, 97 S.Ct. at 1376 (footnote omitted).

The appropriate inference would seem to have been that Congress included the liquor provision in the 1910 Rosebud Act because Congress was aware that the opened areas of the reservation would cease to be "Indian country" because land titles were to change hands, Indian to

A few years later, the Supreme Court expanded the

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non-Indian.

The *Rosebud* majority draws its differing inference by overlooking or blurring the distinction between Indian country and reservations lands elucidated by the Court in *United States v. Celestine*, decided in 1909.

> Indian country, however, did not apply to territory on which "the Indian title had been extinguished, and over the inhabitants of which . . . the jurisdiction of the state was full and complete" *Dick v. United States*, [208 U.S. 340, 28 S.Ct. 399, 52 L.Ed. 520 (1908),] *supra*, at 352, [28 S.Ct. at 402]. Land remaining within the boundaries of a reservation, of course, would not be subject to the "full and complete" jurisdiction of the state . . . While prior to the statutory definition in 18 U.S.C. § 1151, the defined areas of Indian country may have been a bit vague, . . . *Dick* was the most recent pronouncement on the subject at the time of the 1910 Act, and clearly *defined Indian country with reference to state jurisdiction*.

430 U.S. at 614-15 n.47, 97 S.Ct. at 1376-1377 (emphasis added and citations omitted). The *Dick* opinion exhibits no such emphasis on state jurisdiction; it cites *Bates v. Clark* and *Ex parte Crow Dog* as authority for the statement quoted in *Rosebud*, both of which define "Indian country" by land title. The *Rosebud* majority seems to overlook the careful distinctions expressed at that time by the court in *Celestine* as well as a revealing comment in *Clairmont v. United States*, 225 U.S. 551, 32 S.Ct. 787, 56 L.Ed. 1201 (1912), at 558-59, 32 S.Ct. at 789:

> But, as was pointed out in *Bates v. Clark*, *supra*, . . . "When the Indian title is extinguished it ceases to be Indian country, unless some such [statutory] reservation takes it out of the rule." The *same principle of decision* was recognized in *Dick v. United States*, 208 U.S. 340, 28 S.Ct. 399, 52 L.Ed. 520. [Emphasis added.]

The Court in *Clairmont* makes no reference to "full and complete" state jurisdiction or to the termination of reservation status in defining "Indian country" under the liquor laws. Continuing reservation status and state jurisdiction were not necessarily inconsistent. See *e.g.*, *Louie v. United States*, 274 F. 47, 49 (9th Cir. 1921). That extinguishment of Indian title defined "Indian country" in 1910 renders it difficult for this Court to infer that Congress was aware of any other controlling principles in dealing with the Sioux, or the Utes, however meaningful that other rule is today. See *Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 623-24 n. 12, 97 S.Ct. at 1381-1382 (J. Marshall, dissenting).

judicial definition of Indian country to include lands once a part of the public domain which have been reserved and set apart as an Indian reservation by Executive Order,[26] *Donnelly v. United States*, 228 U.S. 243, 269, 33 S.Ct. 449, 458, 57 L.Ed. 820 (1913). After *Donnelly*, reservation boundaries rather than unextinguished Indian title became the material jurisdictional facts, at least in some cases. The courts continued to expand the definition of Indian country[27] until 1948, when Congress codified these judicial expressions into statutory law as 18 U.S.C. § 1151.[28]

That definition is the one currently in force, defining "Indian country" in terms of the boundaries of an Indian reservation, regardless of title. 18 U.S.C. § 1151(a) (1976). It must be recalled that during this whole dynamic chain of events, federal, state and tribal officials were attempting to administer policies in light of the then-governing law. To be sure, as a practical matter, the subtle distinctions described above were sometimes lost upon those who actually lived and worked in the areas on or near the Indian reservations; the remote offices of an Indian agent or county prosecutor were not the likely repositories of complete sets of United States Reports.[29] Conflicting ju-

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[26] Both the Uintah Valley and the Uncompahgre Reservations were created by Executive Orders.

[27] See *e.g.*, *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913) ("Indian country" includes "dependent Indian communities"); *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914) (individual Indian trust allotments); *Pronovost v. United States*, 232 U.S. 487, 34 S.Ct. 391, 58 L.Ed. 696 (1914) (Indian reservation); *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938) (Reno Indian colony).

[28] See *United States v. John*, 437 U.S. 634, 648-49 & n.18, 98 S.Ct. 2541, 2548-2549, 57 L.Ed.2d 489 (1978); text of section at note 13, *supra*.

[29] The administrative process was often complicated by specific statutes that extended state jurisdiction within reservation boundaries. *E. g.*, *Louie v. United States*, 274 F. 47, 49 (9th Cir. 1921).

risdictional practices of federal and state authorities in 1897, or 1905, or for decades thereafter may have institutionalized the erroneous exercise of jurisdiction as well as the valid exercise of jurisdiction.[30] The extensive "jurisdictional history" offered at trial by the parties is far more probative of the existence of an ongoing boundary conflict which requires resolution than it is evidence that one asserted boundary line prevails over another.

V. GOVERNING PRINCIPLES

Litigation of the unique complexity of an Indian reservation disestablishment suit demands the application of specially adapted rules of statutory construction. Over the years, courts adjudicating such cases have formulated such principles.[31] This Court has carefully reviewed the bulk of existing case law on reservation diminishment[32] in an ef-

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[30] The complex problems this Court has faced in evaluating the jurisdictional history of the Uintah and Ouray Indian Reservation only reaffirm the wisdom of an observation by Nathan Margold:

> [I]f the laws governing Indian affairs are viewed as lawyers generally view existing law, without reference to the varying times in which particular provisions were enacted, the body of the law thus viewed is a mystifying collection of inconsistencies and anachronisms. To recognize the different dates at which various provisions were enacted is the first step towards order and sanity in this field.

Introduction, in F. Cohen, Handbook of Federal Indian Law xxviii (N.M. ed. 1971).

[31] Compare *e. g., Hatten v. Hudspeth*, 99 F.2d 501 (10th Cir. 1938) with *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

[32] See *Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065 (D.S.D.1974) *affirmed*, 521 F.2d 87 (8th Cir. 1975), *affirmed*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superin-*

fort to distill an analytical approach to the legal and historical materials in this case that would seem to make sense.

It is recognized as fundamental that Congress has primary authority over and bears overall responsibility for Indian affairs.[33] Decades ago, the Supreme Court recognized that such power governs the results of reservation boundary litigation. In *United States v. Celestine,* 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909), Justice Brewer, writing for a unanimous Court, declared that, "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until

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tendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *Clairmont v. United States,* 225 U.S. 551, 32 S.Ct. 787, 56 L.Ed. 1201 (1912); *United States v. Celestine,* 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909); *Dick v. United States,* 208 U.S. 340, 28 S.Ct. 399, 52 L.Ed. 520 (1908); *Russ v. Wilkins,* 624 F.2d 914 (9th Cir. 1980); *United States v. Minnesota,* 466 F.Supp. 1382 (D.Minn. 1979), *affirmed,* 614 F.2d 1161 (8th Cir. 1980) *(per curiam); United States v. A Juvenile,* 453 F.Supp. 1171 (D.S.D.1978) *reversed sub nom. United States v. Dupris,* 612 F.2d 319 (8th Cir. 1979), *vacated and remanded as moot,* 446 U.S. 980, 100 S.Ct. 2959, 64 L.Ed.2d 836 (1980); *United States v. Wounded Knee,* 596 F.2d 790 (8th Cir. 1979) *cert. denied,* 442 U.S. 921, 99 S. Ct. 2847, 61 L.Ed.2d 289; *United States v. Long Elk,* 410 F.Supp. 1174 (D.S.D.1976), *reversed* 565 F.2d 1032 (8th Cir. 1977); *Beardslee v. United States,* 541 F.2d 705 (8th Cir. 1976); *United States ex rel. Cook v. Parkinson,* 396 F.Supp. 473 (D.S.D.1975), *affirmed,* 525 F.2d 120 (8th Cir. 1975), *cert. denied,* 430 U.S. 982, 97 S.Ct. 1677, 52 L.Ed.2d 376 (1977); *United States ex rel. Condon v. Erickson,* 344 F.Supp. 777 (D.S.D.1972), *affirmed,* 478 F.2d 684 (8th Cir. 1973); *New Town v. United States,* 454 F.2d 121 (8th Cir. 1972); *Ellis v. Page,* 351 F.2d 250 (10th Cir. 1965); *Hilderbrand v. United States,* 327 F.2d 205 (10th Cir. 1964); *Tooisgah v. United States,* 186 F.2d 93 (10th Cir. 1950); *Kills Plenty v. United States,* 133 F.2d 292 (8th Cir. 1943); *United States v. Frank Black Spotted Horse,* 282 F. 349 (D.S.D.1922); *United States v. Kiya,* 126 F. 879, 882 (D.N.D.1903); *Confederated Salish v.Kootenai Tribe v. Namen,* ____F.Supp. ____, No. 2343, et al. (D.Mont. Filed Sept. 20, 1979).

[33] See *e. g.,* 1 American Indian Policy Review Comm'n, Final Report at 106-107 (comm. print 1977).

separated therefrom by Congress." *Id.* 215 U.S. at 285, 30 S.Ct. at 94. This basic precept forms the foundation of the body of case law dealing with reservation disestablishment.

In *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), the Supreme Court, quoting the passage from *Celestine, supra*, held that the boundaries of the southern half of the Colville Indian Reservation remain intact notwithstanding the opening of the reservation to non-Indian settlement by Act of Congress in 1906, and the prior disestablishment of the northern half of the reservation.[34] Unlike the 1892 Act, which provided that the north half be "vacated and restored to the public

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[34] See *Id.* 368 U.S. at 354-59, 82 S.Ct. at 426-429. Generally speaking, reservation disestablishment cases arise as a consequence of the efforts of Congress over a 30-year period to abolish the Indian reservation system by allotting tribal lands in separate parcels to individual tribal members and opening any surplus reservation lands remaining to non-Indian entry and settlement. In addition to the Dawes Act, or General Allotment Act of 1887, Act of Feb. 8, 1887, 24 Stat. 388, which provided general authority for allotment of reservations, Congress enacted 108 separate bills directing the allotment of specific reservations, some times under the provisions of the Dawes Act, often under their own specific terms. See 2 Task Force No. 9, American Indian Policy Review Comm.'s, Report on Indian Law Consolidation, Revision and Codification (Appendix) 235-246 (comm. print 1976). The purpose of the allotment program was to promote the assimilation of Indians into the dominant society by impressing them into the lifestyle of the yeoman farmer. An idealistic near-crusade by the "friends of the Indian" joined by railroads and mining companies, the allotment program was generally disastrous. See D. Otis, The Dawes Act and the Allotment of Indian Lands (Prucha ed. 1973). Between 1887 and 1934, when allotment ceased, 60 million acres of "surplus" reservation land had been sold to non-Indians, as had 27 million acres of lands allotted to individual Indians. W. Washburn, Red Man's Land—White Man's Law 145 (1971). The allotment policy although repudiated as long ago as 1934, continues to have a profound effect on Indian reservation land tenure, having often created a "checkerboard" pattern of land ownership and given rise to boundary and jurisdictional disputes such as the case at bar.

domain,"[35] the 1906 Act[36] and the 1916 Presidential Proclamation[37] implementing the Act did not "purport to affect the status of the remaining part of the reservation. . ." *Id.*, 368 U.S. at 354, 82 S.Ct. at 426. Rather, the 1906 Act merely "opened" the Colville Reservation to non-Indian homesteading, consistent with the purposes of the allotment policy:

> Consequently, it seems clear that the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation. The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Id. 368 U.S. at 356, 82 S.Ct. at 427.[38] Even townsites within the opened reservation were held to remain a part of the reservation, and therefore, "Indian country" under

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[35] Act of July 1, 1892, § 1, ch. 140, 27 Stat. 62, 63, I Kapp. 441-43 (2d ed. 1904). Proceeds from the sale of the restored lands were to go to the government, not the Indians. *Id.* § 2.

[36] Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80, III Kapp. 163-165 (1913).

[37] Proclamation of May 13, 1916, 39 Stat. 1778, IV Kapp. 966-69 (1929).

[38] The opening of the reservations to non-Indian settlement was theorized to be helpful to the Indians as they could learn by example the farming of their own allotments by observing the practices of their "civilized" white neighbors. It would promote co-operation between Indians and whites and ease tensions in reservation communities. The influx of whites, it was believed, would create markets and transportation facilities, would build schools and otherwise be advantageous to the Indians. See D. Otis, The Dawes Act and the Allotment of Indian Lands 17 (Prucha ed. 1973); H.Rep.No. 660, 53d Cong., 2d Sess. 3 (1894); 26 Cong.Rec. 6236 (remarks of Rep. Coffeen) (June 13, 1894).

18 U.S.C. § 1151. *Id.* 368 U.S. at 358-59, 82 S.Ct. at 428-429.

Important to the Court's determination of whether the Colville Reservation had been disestablished by the entry of non-Indians were several factors: (1) the express language of legislation effecting the reservation; (2) the deposit of proceeds from the sale of reservation lands to non-Indians into tribal funds rather than the general funds of the United States; (3) subsequent legislation acknowledging by reference the continuing existence of the reservation; and (4) subsequent administrative determinations by the Department of the Interior and the Department of Justice recognizing continuation of reservation status.

The Supreme Court did not again decide a controversy involving reservation disestablishment until 1973 in the case of *Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). In *Mattz,* a unanimous Court held that the Klamath River Indian Reservation continued to exist within its defined boundaries despite a number of attempts to end the reservation. Reaffirming the fundamental policy expressed in *Celestine* and *Seymour,* the Court in *Mattz* set forth this standard:

> A congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour v. Superintendent,* 368 U.S. 351[, 82 S.Ct. 424, 7 L.Ed.2d 346] (1962); *United States v. Nice,* 241 U.S. 591[, 36 S.Ct. 696, 60 L.Ed. 1192] (1916).

Id. 412 U.S. at 505, 93 S.Ct. at 2258 (footnote omitted). The *Mattz* opinion adds the factors of legislative history and "surrounding circumstances" to the criteria expressed in *Seymour.*[39] The court may thus look behind the written

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[39] In footnote 23, the Court cites with apparent approval the opinion

words of statutory law to determine their meaning and purpose within the spirit of their time, but that historical inquiry is to be carefully channeled. Repeated unsuccessful efforts by members of Congress to terminate a reservation cannot persuade a court that the ultimate legislation opening a reservation was intended to diminish its boundaries without an additional showing of consistent intent. In *Mattz*, for example, the House had tried repeatedly to terminate the Klamath River Reservation but had failed at every attempt. In 1892, the House passed a bill ending the reservation. H.R. 38, 52d Cong., 1st Sess. See 23 Cong.Rec. 125, 1598-99 (1892). That bill was struck out by the Senate which substituted a more moderate bill mandating allotment of the reservation under the General Allotment Act of 1887, 23 Cong.Rec. 3918-19 (1892), a bill supported by the Interior Department. At conference, the Senate version as agreed to, with amendments, and then passed, becoming the operative legislation opening the reservation.[40] The *Mattz* Court cautioned against reliance on the legislative history of the unsuccessful House bills:

> [T]he respondent's reliance on the House Report and on comments made on the floor of the House is not well placed; although the primary impetus for termination of the Klamath River Reservation had been with the House since 1871, this effort consistently had failed to accomplish the very objectives the respondent now seeks to achieve. . . . The legislative history relied upon by the respondent does not support the view that the reservation was terminated; rather, by con-

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in *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1973) in which that court concluded, *id.*, at 689, that a ruling favoring continuing reservation status "is required unless Congress has *expressly or by clear implication* diminished the boundaries of the reservation opened to settlement" (emphasis in original). 412 U.S. at 505 n. 23, 93 S.Ct. at 2258.

[40] Act of June 17, 1892, ch. 120, 27 Stat. 52, I Kapp. 439 (2d ed. 1904).

> trast with the bill as finally enacted, it compels the conclusion that efforts to terminate the reservation by denying allotments to the Indians failed completely.

Id. 412 U.S. at 503-504, 93 S.Ct. at 2257.

The Court further refused to draw a negative inference as to the effect of the actual allotment statute:

> A second conclusion is also inescapable. The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. . . . More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be affected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.[22]

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[22]Congress has used clear language of express termination when that result is desired. . . . [Examples omitted.]

Id. 412 U.S. at 504, 93 S.Ct. at 2257.[41]

The *Mattz* opinion also treats with great care the subsequent legislative and administrative references to the Klamath River Reservation. Noting that "[a]lthough subsequent legislation usually is not entitled to much weight

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[41] The stringent care with which the Court treats the legislative history of a conflict between houses in *Mattz* is of material importance to the case at bar. The 1905 Act that ultimately opened the Uintah Valley Reservation was a Senate substitution for a prior House bill containing clear language of disestablishment. See 1127-1131 *infra*. *Mattz* requires this Court to scrutinize the legislative history relevant herein with great care.

in construing earlier statutes, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 179, 88 S.Ct. 1994, 2006, 20 L.Ed.2d 1001 (1968), it is not always without significance," *id.*, 412 U.S. at 505 n.25, 93 S.Ct. at 2258, the Court found support in legislation by which Congress extended the trust status of allotments within the reservation and restored undisposed-of lands within the boundaries to tribal ownership. At the same time, the Court discounted past-tense references to the reservation (*e.g.*, to "what was the Klamath River Reservation") in legislation as indicating disestablishment, noting that Klamath River had been annexed at that time to the larger Hoopa Valley Reservation and concluding that the past-tense reference "is not to be read as a clear indication of congressional purpose to terminate." *Id.*, 412 U.S. at 498, 93 S.Ct. at 2254.[42] *Mattz*, like *Seymour*, found additional support for continuing reservation status in federal administrative treatment of the reservation.

Mattz elaborated upon the criteria set forth in *Seymour* setting the stage for decisions that followed. In 1975 the Supreme Court decided *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), dealing with the Lake Traverse Indian Reservation in South Dakota. In 1891, Congress passed a law ratifying an 1889 agreement with the Sisseton and Wahpeton bands of the Sioux Nation which provided for the allotment of Lake Traverse Reservation lands to the Indians and the unqualified cession of the unallotted "surplus" lands to the

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[42] The defendants herein emphasize past-tense references to the Ute reservations in various acts and documents as indicative of congressional intent that only the trust lands remain a reservation. See *e.g.*, State of Utah Post-Trial Brief at 18 & fig. 2, 42 & fig. 4; defendant Counties' Post-Trial Brief at 100-101. *Mattz* requires this Court to evaluate those references carefully in light of the specific history of the Ute lands.

United States in return for a sum-certain payment.[43] Those lands were subsequently opened to white settlement with disastrous consequences for the Indians. See D. McNickle, They Came Here First 220-224 (2d ed. 1975). In *DeCoteau*, a majority of the Court led by Justice Stewart found a number of factors that militated against a finding of continued reservation status: contemporaneous views of white and Indians alike tended strongly towards the conclusion that ratification of the 1889 Agreement would end the reservation. The Agreement recited cession language that was "precisely suited" to disestablishment by cession.[44] The 1889 Agreement was ratified in the same bill with similar agreements, the sponsors of the bill acknowledging that the agreements would return the ceded lands to the public domain. The "jurisdictional history" of the reservation offered little support for a finding of continuing reservation status. *Id.* 420 U.S. at 431-449, 95 S.Ct. at 1086-1095.[45]

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285[, 30 S.Ct. 93, 94, 54 L.Ed. 195]. The congressional intent must be clear, to over-

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[43] Act of Mar. 3, 1891, §§ 26-30, 1, ch. 543, 26 Stat. 989, 1036, I Kapp. 429-32 (2d ed. 1904).

[44] Cf. *Clairmont v. United States*, 225 U.S. 551, 556, 32 S.Ct. 787, 788, 56 L.Ed. 1201 (1912).

[45] That the Indians were compensated for the cession of the unallotted lands by sum-certain payment of $2.50 per acre seemed material to the majority's conclusions in *DeCoteau*. See *id.*, 420 U.S., at 448, 95 S.Ct., at 1094. But sum-certain payment proved not to be an effective talisman for determining disestablishment in *Rosebud, supra*, 430 U.S. at 598-599 n.20, 97 S.Ct. at 1368-1369. At best, sum-certain payment is a relevant "disestablishment factor" with meaning supplied by surrounding circumstances.

> come "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174, [93 S.Ct. 1257, 1263, 36 L.Ed.2d 129], quoting *Carpenter v. Shaw*, 280 U.S. 363, 367[, 50 S.Ct. 121, 122, 74 L.Ed. 478]. Accordingly, the Court requires that the "congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. at 505[, 93 S.Ct. at 2258]. See also *Seymour v. Superintendent*, 368 U.S. 351, [82 S.Ct. 424, 7 L.Ed.2d 346], and *United States v. Nice*, 241 U.S. 591[, 36 S.Ct. 696, 60 L.Ed. 1192]. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit. *Mattz v. Arnett, supra*, and *Seymour v. Superintendent, supra*.
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> But in this case, "the face of the Act," and its "surrounding circumstances" and "legislative history,"all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891. The negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands.

Id. 420 U.S. at 444-445, 95 S.Ct. at 1092-1093.

The *DeCoteau* majority was not deterred by the fact that a finding of disestablishment left the Indians with only their allotments:

> It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather than

> simply a major portion of, the affected tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments.

Id. 420 U.S. at 446, 95 S.Ct. at 1094 (citations omitted).[46]

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[46] Justice Douglas, joined by two more Justices, dissented. Particularly troubling to the dissent were the jurisdictional effects of disestablishment:

> If this were a case where a Mason-Dixon type of line had been drawn separating the land opened for homesteading from that retained by the Indians, it might well be argued that the reservation had been diminished; but that is not the pattern that took place after 1891. Units of land suitable for homesteaders were scattered throughout the reservation. It is indeed difficult, looking at a current map, to find any substantial unit of contiguous Indian land left. The map picture, as stated in oral argument, shows a "crazy quilt pattern." The "crazy quilt" or "checkerboard" jurisdiction defeats the right of tribal self-government guaranteed by Art. X of the 1867 Treaty, 15 Stat. 510, and never abrogated.
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> If South Dakota has its way, the Federal Government and the tribal government have no jurisdiction when an act takes place in a homesteaded spot in the checkerboard; and South Dakota has no say over acts committed on "trust" lands. But where in fact did the jurisdictional act occur? Jurisdiction dependent on the "tract book" promises to be uncertain and hectic. Many acts are ambulatory. In a given case, who will move—the State, the tribe, or the Federal Government? The contest promises to be unseemly, the only beneficiaries being those who benefit from confusion and uncertainty. Without state interference, Indians violating the law within the reservation would be subject only to tribal jurisdiction, which puts the responsibility where the Federal Government can supervise it. Checkerboard jurisdiction cripples the United States

Two years following *DeCoteau*, the Court decided *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). *Rosebud* presented the most complex factual situation considered by the Court so far, and required the construction of three separate Acts of Congress. In 1904, 1907 and 1910 Congress opened portions of the Rosebud Indian Reservation to non-Indian entry and settlement.[47] In determining whether the three acts diminished the boundaries of the Rosebud Indian Reservation, Justice Rehnquist, writing for the majority, synthesized the following guiding principles:

> In determining whether or not the 1889 Reservation boundaries were subsequently diminished by congressional enactments, we are guided by well-established legal principles. The underlying premise is that congressional intent will control. *DeCoteau v. District County Court, supra,* [420 U.S.] at 444, 449 [95 S.Ct. at 1092, 1095]; *United States v. Celestine,* 215 U.S. 278, 285 [, 30 S.Ct. 93, 94, 54 L.Ed. 195] (1909). In determining this intent, we are cautioned to follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174 [, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129] (1973), quoting *Carpenter v. Shaw,* 280 U.S. 363, 367 [, 50 S.Ct. 121, 122, 74

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in fulfilling its fiduciary responsibilities of guardianship and protection of Indians. It is the end of tribal authority for it introduces such an element of uncertainty as to what agency has jurisdiction as to make modest tribal leaders abdicate and aggressive ones undertake the losing battle against superior state authority.

Id., 420 U.S. at 466-67, 95 S.Ct. at 1103.

[47] Procedurally, at least, the opening of the Uintah Valley Reservation in 1905 was deliberately patterned after the opening of the Gregory County portion of the Rosebud Reservation in 1904. See 1124-1125 & note 158, *infra*.

> L.Ed. 478] (1930); see also *Mattz v. Arnett, supra,* [412 U.S.] at 505 [, 93 S.Ct. at 2258]. The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status. *Mattz v. Arnett, supra;* see also *Seymour v. Superintendent,* 368 U.S. 351 [, 82 S.Ct. 424, 7 L.Ed.2d 346] (1962). But this "general rule" does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. *DeCoteau v. District County Court, supra.* In all cases, "the face of the Act," the "surrounding circumstances," and the "legislative history," are to be examined with an eye toward determining what congressional intent was. *Mattz v. Arnett, supra,* [412 U.S.] at 505 [93 S.Ct. at 2258].

Id., 430 U.S. at 586-587, 97 S.Ct. at 1362-1363.

Applying those principles to the facts of that case, the majority in *Rosebud* found that "the Acts of 1904, 1907 and 1910 did clearly evidence congressional intent to diminish the boundaries of the Rosebud Sioux Reservation." *Id.* at 587, 97 S.Ct. at 1363. In 1901 the Indians had consented to a cession of a portion of their reservation on terms similar to those in *DeCoteau.*[48] That Agreement

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[48] See Agreement, dated Sept. 14, 1901, between James McLaughlin, on the part of the United States, and the Sioux Tribe of Indians belonging on the Rosebud Reservation:

> ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota . . . .
>
> ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to expend for and pay to said Indians, in

failed of ratification in the Congress because of disagreement over the "sum-certain" method of payment. From this unratified Agreement, Justice Rehnquist discerned "an unmistakable baseline purpose of disestablishment." *Id.* at 592, 97 S.Ct. at 1366. A modified version of the Agreement was submitted to the Sioux in 1903 garnering only a simple majority of the Indians' approval. Though lacking the three-fourths majority previously understood to be required,[49] Congress enacted the 1903 "Agreement" into the 1904 Act, relying upon the Supreme Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903) for authority.[50] Noting that the 1904 Act

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> the manner hereinafter provided, the sum of one million and forty thousand (1,040,000) dollars.

S.Doc. No. 31, 57th Cong., 1st Sess., 28 (1901).

[49] Article 12 of the Fort Laramie Treaty of Apr. 29, 1868, 15 Stat. 635, II Kapp. 998, 1002 (2d ed. 1904), provides in part,

> No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same; . . . . [Emphasis added].

The three-fourths ratification requirement was followed in most subsequent agreements with the Sioux including the 1901 Agreement. See Act of Mar. 2, 1889, § 28, ch. 405, 25 Stat. 888, I Kapp. 328, 339 (2d ed. 1904); Agreeement of Sept. 14, 1901, Art. VI, S.Doc. 31, 57th Cong., 1st Sess. 28 (1901). But see *United States v. Sioux Nation of Indians*, 448 U.S. 371, 382-384, & nn. 13-14, 100 S.Ct. 2716, 2723-2724, 65 L.Ed.2d 844 (1980), discussing the Act of Feb. 28, 1877, ch. 72, 19 Stat. 254, I Kapp. 168-172 (2d ed. 1904).

[50] See Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254, III Kapp. 71-75 (1913). According to Justice Rehnquist,

> [A]s Inspector McLaughlin had explained to the Tribe, Congress understood that it was not bound by the three-fourths-consent requirement of the 1868 Treaty with the Sioux Nation. In *Lone Wolf v. Hitchcock*, 187 U.S., at 566, 568, [23 S.Ct., at 221, 222], this Court dealing with the validity of a cession of tribal lands enacted in contravention of a treaty requiring three-fourth Indian

contained cession language that seemed "precisely suited to disestablishment" under *DeCoteau*, the *Rosebud* majority found requisite congressional intent to diminish the reservation. The opinion buttresses this finding by observing that Congress provided that state school sections be selected in the opened area and by noting the "long-standing assumption of jurisdiction by the State" over the opened area. *Id.* 430 U.S., at 599-601,[51] 603-605, 97 S.Ct. at 1369-1370, 1371-1372. The majority further found that the same intent to diminish was embodied in the 1907 and 1910 Acts.[52]

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consent, held:

> "The power exists to abrogate the provisions of an Indian treaty, through presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress . . . .
>
> ". . . In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."
>
> Although Inspector McLaughlin failed to garner the signatures of three-quarters of the Indians in consent of the proposed changes, Congress understandably relied on this holding as authorizing it to diminish unilaterally the Reservation boundaries.

Id., 430 U.S. at 599, 97 S.Ct. at 1369 (footnote omitted).

Inspector McLaughlin similarly relied upon *Lone Wolf* in dealing with the Utes at Uintah. See Minutes of Council held with the Utes, May 18-23, 1903, JX 162.

[51] It is interesting to note that state sections were not selected within the Uncompahgre Reservation area until the 1960's, and within the Uintah Reservation not at all. See 1146-1147 *infra*. The "jurisdictional history" is also far less clear herein. See 1146-1147 & notes 200-201A, *infra*.

[52] See Act of Mar. 2, 1907, ch. 2536, 34 Stat. 1230, III Kapp. 307

Reading all of these cases together, this Court has sought to evaluate the record in this case pursuant to the following ladder of priorities: (1) the express language of Congress as found in the relevant statutes and its legal effect; (2) the legislative history of a statute, particularly where the language of the statute is ambiguous; (3) contemporaneous interpretations by the President and the executive branch; subsequent congressional and administrative actions and interpretations; other "surrounding circumstances," including school lands selections, "jurisdictional history" (disputed as it is), the intent and understanding of the Indians; and other factors, all weighed against the unique historical context in which they arise. At all times, the effort of this Court has been to harmonize its analysis herein with the principles expressed in *Rosebud, DeCoteau, Mattz* and *Seymour,* and by other courts in other cases, see note 32, *supra,* to the extent that an analogy can be drawn from each case based upon its particular facts. All of the factors considered in this case have been measured by the principle mandated by the Supreme Court as recently as *Rosebud, supra,* that " '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *Id.,* 430 U.S. at 586, 97 S.Ct. at 1362, quoting *Carpenter v. Shaw,* 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930). *Rosebud* requires that "a congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.,* 430 U.S. at 586, 97 S.Ct., at 1362, quoting *Mattz, supra,* 412 U.S., at 505,

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(1913); Act of May 30, 1910, ch. 260, 36 Stat. 448, III Kapp. 459 (1913); *Rosebud, supra,* 430 U.S. at 605-615, 97 S.Ct. at 1372-1377. Justice Marshall, joined by Justices Brennan and Stewart (the author of *DeCoteau*) dissented, arguing that the evidence of congressional intent as to the Rosebud Reservation "is palpably ambiguous," 430 U.S. at 618, 97 S.Ct. at 1379.

93 S.Ct.. at 2258.[53] Other cases generate a presumption that Congress does not intend the impractical result of "checkerboard jurisdiction" over trust and fee lands absent specific language to that effect. *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 478, 96 S.Ct. 1634, 1643, 48 L.Ed.2d 96 (1976); *Seymour v. Superintendent, supra,* 368 U.S. at 358, 82 S.Ct. at 428; *United States v. Long Elk,* 565 F.2d 1032, 1039 & n.12 (8th Cir. 1977).

This Court's task has been to apply in a reasoned manner the principles described above to the historical record herein and to determine whether that record provides "the hard evidence necessary to overcome the general presumption against an intent to disestablish a reservation," *United States v. Long Elk,* 565 F.2d 1032, 1040 (8th Cir. 1977).

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[53] Counsel for the defendant counties asserts that *Rosebud* and *DeCoteau* "represent a significant departure from the approach taken in *Seymour v. Superintendent* and *Mattz v. Arnett.*" Defendant Counties Post-Trial Brief at 6-11. The arguments presented are not persuasive. Referring to *Seymour* and *Mattz,* the majority opinion in *DeCoteau* commented,

> The Court of Appeals thought that a finding of termination here would be inconsistent with *Mattz* and *Seymour.* This is not so. *We adhere without qualification to both the holdings and the reasoning of those decisions.* But the gross differences between the facts of those cases and the facts here cannot be ignored.
>
> * * * * * *
>
> Thus in finding a termination of the Lake Traverse Reservation, we are not departing from, but following and reaffirming, the guiding principles of *Mattz* and *Seymour.*

DeCoteau, supra, 420 U.S. at 447, 449, 95 S.Ct. at 1094 (emphasis added).

While the dissenting opinions extensively quoted by counsel indicate a disagreement, it is much more a disagreement among the Justices as to the application of accepted standards to specific facts than a demonstrated retreat from established principles. See *Rosebud, supra,* 430 U.S. at 586-588 & n.4, 97 S.Ct. at 1362-1363.

The pages that follow report this Court's findings and conclusions.

IV. EARLY HISTORY OF THE UTE RESERVATIONS

At the time that Europeans made their first significant contact with the Ute Indians, the Utes dwelled within a territory that included large portions of Colorado, Utah and Northern New Mexico. The Ute economy was based largely upon hunting and gathering of food.

> As hunters, the Utes used areas far beyond their borders, especially in the plains area around the eastern area of their residing area. The game which formed their principal subsistance included large game such as elk, deer, bear, antelope and buffalo. A wide variety of smaller animals were also a part of their diet, as well as trout, berries, and a variety of seeds.

F. O'Neil, "A History of the Ute Indians of Utah Until 1890," at 1 (unpub. Ph.D. dissert., Univ. of Utah 1973). The Ute people were generally organized into several bands, which included (ca. 1830): Tumpanuwac, Pahvant (now Uintah), Yamparka (White Rivers), Wiminuc (now Ute Mountain), Taviwac (or Tabeguache, now Uncompahgre), Kapote (now Capote), and Muwac (Muache).[54] The plaintiff Ute Indian Tribe is comprised of the present Uintah, White River and Uncompahgre Bands.

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[54] J. Jorgensen, "A Ethnohistory and Acculturation of the Northern Ute" at 18 (unpub. Ph.D. dissert., Univ. of Indiana 1965). The Ute Mountain, Capote and Muache Bands of the Ute Indians reside on reservations located in southern Colorado and are not parties to this litigation. See generally, N. Wood, When Buffalo Free the Mountains (1980). Other Ute Bands designations have included Parianuche (or Grand River, consolidated at Uintah and Ouray Reservation), Timpanogos (now Uintah), Sambuawac (part of White River Band), Sheberetche (most killed; survivors scattered) and Weber (partly included in Uintah). F. O'Neil, "A History of the Ute Indians . . .," *supra*, at App. A.

While the Utes maintained significant contact with the Spanish settlements to the south, Spanish activities had negligible effect on the extent of the Ute territory. Trade and commerce dominated the relationship.[55]

The arrival thereafter of Anglo-American fur trappers and explorers heralded a different course of events. The early decades of the nineteenth century saw a scattering of white explorers, adventurers and mountain men burgeon into a steady flow of white intruders into Ute country. Conflicts developed between Indian and white, and relations decayed until the economic collapse of the fur trade in the 1840's.[56] The mountain men were followed by the Mormons, who sought to settle upon lands in Ute country and make them their home. The struggle for possession of the most fertile lands, those in Utah Valley and other locations commenced soon thereafter:

> The arrival of white settlers was not particularly disturbing to Utah's Indians since the Great Salt Lake was a border area between the Utes and the Shoshoni bands which ranged over the Great Basin west of there. As the Mormons moved south, however, taking up new land, the Indians were crowded off their central settlements, in Utah Valley and elsewhere. This southern thrust prompted Ute resistance—first at Battle Creek in 1850—and then the so-called "Walker War" of 1853-54.

O'Neil, "The Reluctant Suzerainty: The Uintah and Ouray Reservation," 39 *Utah Historical Quarterly* 129, 130 (Spring 1971).

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[55] See *e.g.*, Tyler, "The Spaniard and the Ute," 22 *Utah Historical Quarterly* (Oct. 1954); Hill, "Spanish and Mexican Exploration and Trade Northwest from New Mexico into the Great Basin," 3 *Utah Historical Quarterly* (Jan. 1930).

[56] F. O'Neil, "A History of the Ute Indians . . .," *supra*, at 16-23.

For Utah, which became Provo, Utah, for example, was founded upon the central campsite of the Tumpanuwac Band of Utes. The lands were of considerable value to the Utes, being abundant in fish, game, forage for horses and fresh water. The Utes resisted and were either killed, or captured and removed from their homelands.[57] For a time, the federal Indian Agent for Utah, Dr. Garland Hurt, established a small system of three Indian farm reserves which were intended to provide support and sustenance for the Utes, Paiutes and others.[58] However, the farms were plagued by disorganization and funding problems and became entangled in the conflict between the Mormons and the federal government that surged in the late 1850's. Many Ute people died of starvation and exposure during the bitter winters of 1859-60 and 1860-61.[59] When a new federal Superintendent of Indian Affairs, Benjamin Davies, arrived in Utah in early 1861, the Utes were, according to Davies, in a "state of nakedness and starvation, destitute and dying of want."[60] Davies was forced to close

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[57] *Id.* at 27-41; cf. A. Neff, History of Utah, 1847 to 1869, at 364-409 (1940).

[58] Agent Hurt intended that the farms be made permanent reservations by treaty. As it stood, the farms rested solely upon the Agent's authority. *Id.*, at 42-44. Agent Jarvis established a fourth "reservation" for the "Snakes and Gosi Uta," the Shoshones and Goshiutes, at Deep Creek in western Utah in 1859. C. Royce, Indian Land Cessions in the United States 831 (1900). The farm reserves have the designations Royce Area 449-452 and are described, *id.* at 830, and mapped *id.* at pl. 165 "Utah 1" (map).

[59] *Id.* at 42-50.

[60] Letter from Sup. Davies to Comm. Dole of June 30, 1861, in Report of the Commissioner of Indian Affairs, 1861, at 129. Historian Hubert Howe Bancroft writes of those times:

> The natives had no alternative but to steal or starve; the white man was in possession of their pastures; game was rapidly disappearing, in the depth of winter they were starving and almost unclad, sleeping in the snow and sleet, with no covering but a

the farms, selling the implements to buy food for the Indians.

> By 1860, the traditional solution of Indian removal could no longer be delayed. The Mormon towns and villages had been generous in supplying food, but this could not serve as a permanent arrangement. After an experience of general disagreement, the federal officials and the Mormon settlers finally agreed that the Indians must be moved.

F. O'Neil, "A History of the Ute Indians of Utah. . .," *supra,* at 51.

The valley of the Uintah Basin had already been proposed as a possible reservation for the Indians of Utah by Superintendent Davies' predecessor. At the suggestion, Governor Brigham Young delegated a survey team to the basin to see whether the lands were suitable for settlement by the Mormons. Receiving a negative report,[61] the Governor did not oppose the federal officials' request to Washington that the basin be set aside as an Indian reservation. Less than a month after the survey team's return Presi-

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cape of rabbit's fur and moccasons [sic] lined with cedar bark.

H. Bancroft, History of Utah 629 (1890).

[61] Upon return, the team reported its findings:

> UINTAH NOT WHAT WAS REPRESENTED
>
> The exploring and surveying party have returned with a very unfavorable report . . . The fertile vales, extensive meadows, and wide pasture ranges so often reported to exist in that region were not found . . . The amount of land at all suitable for cultivation is extremely limited.

Deseret News, Sept. 25, 1861. The Secretary of the Interior, on the other hand reported the Uintah Basin was "abounding in valleys of great fertility . . . Rept. of the Secretary of the Interior, 1864, JX 1, at 161. Agents delegated to the reservation gave no such glowing description. See *e.g.*, J.J. Critchlow to Commissioner Walker, Sept. 1, 1872, in Rept. of the Secretary of the Interior, 1872, at 673.

dent Lincoln approved the Secretary of the Interior's proposal and designated the Uintah Basin as a reservation by the Executive Order of October 3, 1861.[62]

The federal government initially made little effort to provide a viable agency establishment of the Uintah Valley Reservation or to afford the Utes any incentive for moving there. Combined with the closing of the Indian farms, the Indian Bureau's neglect at Uintah left the Utes to their own devices. The bands scattered into loose associations of families which hunted, gathered and raided for food. A number of Utes prosecuted a series of raids upon white livestock and settlements.

Acting pursuant to congressional directive, O. H. Irish, new Superintendent of Indian Affairs for Utah, succeeded in securing the presence of many of the Utes at a treaty council at the old Indian farm at Spanish Fork, Utah, which was held in June, and included the presence of ex-Governor Brigham Young.[63] On June 8, 1865, the assembled Utes concurred in a draft of a treaty by which they ceded all right, title and interest in their lands in Utah in return for the guarantee of possession of the Uintah

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[62] See I Kapp. 900 (2d ed. 1904), or Appendix A, *infra*, for text.

[63] Brigham Young was a key figure in the negotiations. On prior occasions Young had visibly been at odds with the federal agents in their dealings with the Utes. At Spanish Fork, Young and Irish presented a united front, which pleased the Indians assembled:

> KON-OSH (Geo. Bean, Interp.): * * * I like this good friendly council, I always liked a council where it is good and friendly and where all agree together; and my friends like it. It pleases me very much to see Supt. Irish and Brigham agreeing on this treaty and traveling together and talking to the Indians. In former times it has been when an agent came here President Young would stay at one side; and I was sorry that they could not agree. * * *

Quoted in F. O'Neil, "A History of the Ute Indians . . .," *supra*, at 66.

Valley Reservation, to which they agreed to remove.[64] The treaty also made detailed provision for the staffing and operation of the Uintah Agency, and provided that the 291,480 acres of Indian farm reservations be sold, proceeds to be applied to improvements at the Uintah Reservation.[65] Superintendent Irish held a similar council with the Weber Utes, securing their agreement to the terms of the Spanish Fork Treaty under Article I of an abbreviated treaty of October 30, 1865.[66]

While Irish and Young were adamant in their insistance that the Indians sign the treaty, they apparently failed to indicate to the Indians that there was doubt as to ratification of the treaties by the Senate. After all, Congress on February 23, 1865 had authorized a budget of $25,000 to finance the negotiation of these treaties.[67] A year earlier, Congress had mandated the sale of the small "farm" reservations and had confirmed the establishment of the Uintah Valley Reservation.[68] Yet when submitted, the treaties failed of ratification.[69]

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[64] "In 1864, the Utah Legislature memorialized Congress for asking for the removal of the Indians to as far south as Sanpete. The document asked that the Indians be removed to the Uintah Valley which had been set apart as an Indian reservation by executive order of Abraham Lincoln in October, 1861."

Ute People—An Historical Study 26 (O'Neil & Sylvester ed. 1969). By the treaty, the white people of the territory would have had what they wanted.

[65] See V Kapp. 695-698 (1938), LD 6, or Appendix A, *infra*, for text.

[66] See V Kapp. 698-699, or Appendix A, *infra*, for text.

[67] See Act of February 23, 1865, ch. 45, 13 Stat. 432, LD 5. This Act authorized the President to enter into land cession treaties with Indian tribes in the Utah Territory, provided that any reservations created by treaty "shall be selected at points as remote as may be practicable from the present settlements in Utah Territory." *Id.*, § 1.

[68] Act of May 5, 1864, ch. 77, 13 Stat. 63, LD 4; see Appendix A, *infra*, for text.

[69] it is very likely that the conflict between the Mormons and the

The uneasy peace generated by the Spanish Fork Council and agreement to the treaty by the Indians soon decayed again into armed conflict. Rejection of the treaty left the Utes without the promised economic support and with a strong sense of betrayal. The brush fire war that continued in the territory for the next four years came to be known by the name of its leader: the Black Hawk War.

> The war was costly. Bancroft wrote that "more than fifty of the Mormon settlers were massacred, and an immense quantity of livestock captured, and so widespread was the alarm that many of the southern settlements were for the time abandoned, the loss to the community exceeding $1,000,000." [H. Bancroft, History of Utah 632-33 (1889).] The war dragged on until the Indians were forced into defeat by the superior power of the territorial militia. Under the leadership of Chief Tabby, who favored peace, the reluctant natives were removed to the Uintah Valley. . .

O'Neil, "The Reluctant Suzerainty: the Uintah and Ouray Reservation," 39 *Utah Historical Quarterly* 129, 131 (Spring 1971), JX 475.

Even those Indians who had removed to the Uintah Valley Reservation in 1866 were compelled by conditions there to venture on raids into the Heber Valley in search of food needed for bare survival. Even after hostilities had largely ceased, the early farming efforts at the parsimon-

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federal government interfered, but it is also true that Congress failed to ratify other treaties as well. The Mormons had "sat out" the Civil War. Less than two score of the Saints from Utah served that conflict, and those who did serve did so against the advice of Mormon leaders .... Congress was ill-disposed toward the Mormons; that was perfectly clear. How much that ill-disposition was involved in preventing the ratification of the treaty will remain conjecture.F. O'Neil, "A History of the Ute Indians . . .," *supra*, at 67-68.

F. O'Neil, "A History of the Ute Indians . . .,*supra*, at 67-68.

iously funded Uintah Agency were largely a failure, leaving the Utes to hunt and forage for food, or continue raiding on a sporadic basis. On January 3, 1871 the *Deseret Evening News* published an editorial, "Bretheren, Don't Kill the Deer," urging non-Indians to leave the available wild game for hunting by the Utes.

A new agent, J. J. Critchlow, was sent to the Uintah Agency in February, 1871. Over the next dozen years, Critchlow struggled to develop a viable agricultural economy on the reservation, constantly entreating the Utes to stay on the reservation long enough to farm so that they need not leave in search of food. He also engaged in an unending effort to secure adequate federal funding for agency operations. Critchlow's efforts soon began to bear fruit as some of the Utes made Uintah Valley their permanent residence.[70] In 1875, a federal surveyor, went to the Uintah Valley Reservation to delineate its boundaries.[71] Though the survey did no more than define those boundaries to a great extent, it added credibility to rumors circulating at the Uintah Agency that the reservation would soon be "opened" to white settlement. Agent Critchlow stiffly rebuffed any such effort:

> One Great source of discouragement and uneasiness [among the Utes] is the constant apprehension that some radical change, either in their location or in the administration of their affairs, will take place, and thus interfere with all their industrial pursuits. They

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[70] See *e.g.*, Letter from J.J. Critchlow to E.P. Smith, of Sept. 25, 1873, in Rept. of Comm. of Ind. Aff., 1873 at 628 (1873).

[71] The surveyor, Charles L. DuBois, delineated the first authoritative boundary for much of the Uintah Valley Reservation. See Field Notes of a Survey of the [Uintah Valley Reservation], JX 2 (1875). The DuBois survey was "accepted and approved" on December 24, 1875. Letter of Commission of Indian Affairs [hereinafter "Comm. of Ind. Aff."] to the Secretary of the Interior of Mar. 25, 1898, JX 101. See also letter from Commissioner of the General Land Office to Comm. of Ind. Aff. of Mar. 11, 1902, JX 130.

> are afraid that this reservation will be thrown open to white settlers, they be removed to some other place, and thus lose all their labor. . . . My own opinion is that any such change would work great injury and injustice to these Indians, yet I know that many in this Territory would do anything to bring it about. . . .

Report of J. J. Critchlow to Commissioner of Indian Affairs, August 15, 1878, in the Rept. of Comm. of Ind. Aff., 1878, at 624. By 1880 the Utes were already feeling pressure upon their boundaries; trespassing was becoming a problem on the western end of the reservation, and the rise of non-Indian towns such as Ashley (now Vernal) presaged a growing white presence near the Utes.

At that same time, pressure on the Utes of Colorado at their large reservation created by the Treaty of March 2, 1868, 15 Stat. 619, II Kapp. 990 (2d ed. 1904), LD No. 7, was growing to firestorm proportions. The battle-cry "The Utes Must Go!" echoed across that state, fired by a combination of outrage over the 1879 killing of Nathan Meeker, the utopian Agent to the Colorado Utes, and his family by the White River Utes, and persistent rumors of mineral wealth underlying the Colorado Ute Reservation. In the view of Colorado's Governor Pitkin the Utes should either be removed or killed:

> My idea is that, unless removed by the government, they must necessarily be exterminated. . . . The state would be willing to settle the Indian trouble at its own expense. The advantages that would accrue from the throwing open of 12,000,000 acres of land to miners and settlers would more than compensate all the expenses incurred.

Quoted in D. Brown, Bury My Heart at Wounded Knee 366 (1970).

Custer's defeat at the Battle of the Little Big Horn having happened a mere three years before, sympathy for

the Indians was still scarce among influential politicians. The "Meeker Massacre" joined "Custer's Last Stand" as a popular pretext for coercing the cession of vast expanses of Indian real estate previously guaranteed by treaty.[72] Besides securing the removal of the White River Utes from Colorado and placing them upon the Uintah Valley Reservation over the protests of Agent J. J. Critchlow,[73] the government also secured the "consent" of the Uncompahgre Utes to a removal agreement signed March 6, 1880 and ratified by Congress on June 15. See Act of June 15, 1880, 21 Stat. 199, LD 11.

The text of that agreement provided for a new home for the Uncompahgres and White Rivers:

> The Uncompaghres Utes agree to remove to and settle upon agricultural lands on Grand River near the mouth of the Gunnison River in Colorado, and such other unoccupied agricultural lands as may be found in that vicinity and in the territory of Utah.

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[72] See R. Andrist, The Long Death 331 (pap.ed.1964); Sprague, "The Bloody End of Meeker's Utopia," 8 *American Heritage* 36, 94 (Oct. 1957):

> The punishment of the alleged guilty was all the land-grabbers could have asked. The two White River Bands were branded as criminals en masse by political commission without any judicial powers whatever. Though only twenty White River Utes had staged the massacre, all 700 were penalized in that money owed to them by the government was paid instead to the relatives of the victims. Chief Ouray's Uncompahgre Utes, who had nothing to do with the massacre or the "ambush" were held equally responsible. The 1868 treaty right of all three bands were cancelled. Their right to be Americans under the Fourteenth Amendment were ignored. Title to their ancient Colorado homeland was extinguished and they were moved at gun point to barren lands in Utah. By these means the last and largest chunk of desirable Indian real estate was thrown open to white settlement.

[73] See Rept. of the Comm. of Ind. Aff., 1881, JX 5, at 215.

> The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

While the Uncompahgres Utes were originally intended to be resettled near the present location of Grand Junction, Colorado,[74] a federal commission selected a rectangular area of land in eastern Utah bordering on Colorado's western boundary.[75] The reservation selected for the Uncompahgres was largely comprised of arid lands barren of fertile soil, a sharp contrast to the rich forests, meadows and ranges that the Utes left behind in Colorado.[76]

The Ute Commission, which selected the lands for the Uncompahgres, made an important recommendation:

> Until the Indians can be made somewhat familiar with their new relations, it is . . . of vital importance to maintain the exterior boundary limits of the lands upon which they dwell as a reservation, and within which white men may not be allowed to locate. This protection may be secured by legislation or possibly by executive order. For years to come these Indians should certainly have the aid of the government in protecting them from collision with white men.

Report of the Commissioner of Indian Affairs, 1881, at 383. An agency was established at Ouray in 1881 as well as a military post, Fort Thornburg. Non-Indians living in the region were paid the value of their improvements and

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[74] See F. O'Neil, "A History of the Ute Indians . . .", *supra* at 147.

[75] See Rept. of the Comm. of Ind. Aff., 1881, at 37.

[76] With great irony, the Uncompahgres, who had remained at peace with their white neighbors and who had intervened in 1879 to avoid further violence involving the White River Band following the Meeker incident, were moved to a near-desert while the more contentious White River Band was moved to the relatively fertile acreage of the Uintah Valley Reservation. See also Rept. of the Comm. of Ind. Aff., 1881, JX 5, at 2.

removed.[77] By an Executive Order dated January 5, 1882 President Chester A. Arthur set apart the Uncompahgre lands as an Indian reservation. I Kapp. 901 (2d ed. 1904), LD 12 (see Appendix A for text).

The removal of the Uncompahgre Band to their new home in eastern Utah was plagued with a number of difficulties. In spite of the fact that the Uncompahgres were expected to found an agricultural economy upon lands that were "a wild and ragged desolation,"[78] Ouray Agent J. F. Minniss in his first report described the Uncompaghres as "orderly, quiet and peacefully disposed with a disposition to their welfare."[79] The reservation would not support them, their attitude notwithstanding; a number of Uncompahgre Utes ventured back into Colorado to hunt, giving rise to no small amount of excitement among the white settlers. See, e. g., O'Neil, "The Reluctant Suzerainty. . ., *supra*, JX 475 at 136-137; Annual Rept. of the Secretary of the Interior, 1887, JX 14, at 283-286.

In 1886, the military post of Fort Duchesne was established and the Uintah Agency and the Ouray Agency were consolidated under its roof.[80] The move was made partly for administrative efficiency but also to enable the federal officials to exercise greater direct control—even military control—over all the bands. The Utes had barely begun to settle down on their reservation homes and farms when they began to feel the pressure of white encroachment upon their remaining lands.

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[77] O'Neil and MacKay, "A History of the Uintah-Ouray Ute Lands," at 14 & n.56 (Am.West Center Occas. Pap. 1977), JX 483.

[78] H.Rep.No.3305, 51st Cong. 2d Sess. 4 (1890). Prophetically the reporting agent found the land "valuable for nothing unless it shall be found to contain mineral deposits"—which, indeed, it was.

[79] Letter of J.F. Minniss to Comm. of Ind. Aff. of Aug. 30, 1882, *in* Rept. of the Comm. of Ind. Aff., 1882, at 208.

[80] Annual Rept. of the Comm. of Ind. Aff., 1886, JX 12, at 127-129, O'Neil, "The Reluctant Suzerainty . . .," *supra*, JX 475 at 137.

> As in Colorado, it was the discovery of mineral deposits in Utah which forced the Utes to lose more land. The mineral was gilsonite. Although the presence of gilsonite was well known in the 1860-1870's, it was not until the 1880's that two promoters, Sam Gilson and Bert Seabolt, publicized the materials and found uses for it. In January, 1886 Seabolt filed the first recorded gilsonite claims—all of them in the Carbon Vein, which was located on the Uintah Indian Reservation. He organized a group to begin commercial mining.

O'Neil and MacKay, "A History of the Uintah-Ouray Ute Lands," *supra*, JX 483 at 15 (footnote omitted).

The government opened a series of roads across the Uintah Valley Reservation. Ashly Valley, east of Fort Duchesne, was settled beginning in 1878 by a group of Mormon settlers. Even the establishment of Fort Duchesne attracted unsavory characters to Indian country, creating additional problems. See O'Neil, "A History of the Ute Indians. . .," *supra*, at 181. The Utes also felt pressure on their western boundary as white ranchers from Heber ran their livestock onto the lands in the Strawberry Valley. Agent T. A. Byrnes confronted the cattlemen, demanding either payment of an informal "lease" fee or removal of stock. Byrnes estimated that there were 6,000 cattle illegally grazing on the Uintah Reservation in 1887 alone. *Id.*, at 183-184. The "familiar forces"[81] of non-Indian ranchers, farmers, miners, railroads, etc. were closing in on Ute country as they had in other places, forcing the eventual reduction of the Indian land base.[82]

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[81] *DeCoteau v. District County Court*, 420 U.S. 425, 431, 95 S.Ct. 1082, 1086, 43 L.Ed.2d 300 (1975).

[82] See e.g., Act of Mar. 3, 1887, ch. 368, 24 Stat. 548, LD 14 (granting railroad right-of-way).

VII. THE 1888 CESSION

In response to Ute complaints about white trespassing in the eastern end of the Uintah Valley Reservation, Agent Byrnes recommended that the "Gilsonite Strip" be removed from the reservation; after all, the lands "are not, nor have they been, used or occupied by the Indians, for the reason that they are not fit for agricultural or grazing purposes." Letter of Agent Byrnes to J. Atkins of Feb. 18, 1888, *quoted in* JX 483 at 15.[83] Speaking of the Gilsonite Strip, Captain J. Randlett of Fort Duchesne observed:

> [D]etachment by sale will occasion no inconvenience to the tribes. If the Gilsonite enterprise proves a success, the Indians will see how profits are made from industry and will also to some extent find at the mines a market for their own products... It will be very agreeable to the isolated garrison to have a settlement near it.

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[83] It apparently did not occur to Byrnes—or others—that the Indians might benefit from these mineral deposits in the same manner as their non-Indian neighbors. See *e.g.*, remarks of State Inspector of Mines Thomas Lloyd in an article in the *Salt Lake Tribune* of March 11, 1897:

> Certain sentimentalists have said it was a shame to rob the red man out of what the Government had set aside for his benefit.... Tell me how a man who has located a gilsonite claim has robbed an Indian? Why the loafer never was known to dig for anything, and can never be taught to....

Attachment to the letter of Agent Randlett to Comm. of Ind. Aff. of Mar. 15, 1897, JX 69. Of course, the Utes since then have pursued mineral development for years.

Letter of Capt. Randlett to Agent Byrnes of Feb. 18, 1888, *quoted in* JX 483 at 15.

Congress soon joined in the view that the best interests of everyone would be served by excising the Gilsonite Strip from the Uintah Reservation. See H.Rep.No.791, 50th Cong., 1st Sess. (1888) LD 15; S.Rep. No.1198, 50th Cong., 1st Sess. (1888) LD 17; 19 Cong.Rec. 1927-1929, 3776, 3821 (1888), LD 16. By the Act of May 24, 1888, ch. 310, 25 Stat. 157, I Kapp. 271 (2d ed. 1904) LD 18, Congress mandated that the 7,040-acre triangular Gilsonite Strip be "declared to be public lands of the United States and restored to the public domain." *Id.* § 1. The Act directed the Secretary of the Interior to procure the approval of a three-fourths majority of the adult male Indians on the reservation and upon such ratification, to sell the lands at not less than $1.25 an acre. *Id.* §§ 2, 3. After "much proselyting"[84] the ratification by the Indians was secured on October 8, 1888, and on October 22, the Secretary of the Interior restored the land to the public domain and ordered surveys to be conducted. See Letter of Acting Comm. of Ind. Aff. to Secretary of the Interior of Sept. 9, 1899, JX 116; Report of Uintah and Ouray Agency *in* Rept. of the Comm. of Ind. Aff., 1890, JX 18, at 280. By letter of July 9, 1895, JX 45, the Commissioner of Indian Affairs reported to Agent J. Randlett that sale of some of the lands had been completed and that the United States Treasury had credited $3,340 to the Utes. Other sales followed. It is abundantly clear to this Court that the 1888 cession area, known as the Gilsonite Strip, was restored to public lands status and that the boundaries of the Uintah Valley Reservation were diminished to that extent.[85]

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[84] O'Neil & MacKay, "A History of Uintah-Ouray Ute Lands," JX 483, at 15 & n.65 (1977).

[85] See C. Royce, "Indian Land Cessions in the United States," JX 119, at 926-927 (1900). Royce designates the 1888 cession within area No. 431 and it is depicted as a scarlet triangle on Pl. 165 the "Utah 1" map in that volume.

A congressional intent to diminish the reservation was indeed "expressed on the face of the Act" and is "clear from the surrounding circumstances and legislative history." *Mattz v. Arnett,* 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 586, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977). The Ute Tribe asserts a contrary view, citing some congressional debate on whether the effect of the 1888 Act was to restore the strip to the public domain,[86] and arguing that only a change of land title was intended. Plaintiff's Post-Trial Brief at 57-59. In *Rosebud Sioux Tribe v. Kneip, supra,* the Supreme Court acknowledged the authority of the cases holding that ceded lands can remain in trust for the Indians until actually sold. See *Ash Sheep Co. v. United States,* 252 U.S. 159, 166, 40 S.Ct. 241, 242, 64 L.Ed. 507 (1920); *Minnesota v. Hitchcock,* 185 U.S. 373, 395, 401-402, 22 S.Ct. 650, 661, 46 L.Ed. 954 (1902); accord, *Hanson v. United States,* 153 F.2d 162, 163 (10th Cir. 1946) (Uintah lands). But the *Rosebud* majority found that question to be "logically separate from a question of disestablishment." *Rosebud, supra,* 430 U.S. at 601 n.24, 97 S.Ct. at 1370. While an inference can justifiably be drawn from the continuing trust status of the affected lands, that factor is one among many "surrounding circumstances." Here it is soundly refuted by clear expressions of legislative intent, the use of language precisely suited to disestablishment, cf. *Seymour v. Superintendent,* 368 U.S. 351, 354, 82 S.Ct. 424, 426, 7 L.Ed.2d 346 (1962),

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[86] See *e.g.,* 19 Cong.Rec. 1928 (1888) (remarks of Rep. Holman), LD 16:

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> If we buy [the lands] from the Indians, paying them a fair valuation for them, of course, the general land laws would apply. But here we are selling the land belonging to the Indians for the benefit of the tribe—these Utes—and we are not proposing to divest them of the title, but our proposition is to sell them as their trustee for their benefit, . . . *So it does not become in any sense a part of the public domain.* [Emphasis added.]

and unconflicting contemporaneous interpretations of the effect of the Act. In a November 18, 1895 letter to the Secretary of the Interior, the Commissioner of Indian Affairs comments that the 1888 Act

> had been fully executed in accordance with its intent so far as the securing of the consent of the Indians *to the diminution of their reservation and the restoration of said strip of land to the public domain,* and that, therefore, the jurisdiction of the United States Indian Agent are the same ceased from and after October 22, 1888. . . .

Id., JX 50 at 1 (emphasis added). In fact, the federal officials had come to regret the withdrawal of the strip from the reservation because of problems caused by the influx of squatters onto the lands.[87] When several Uncompahgre Utes selected allotments that were found to be within the 1888 cession area, officials sought instructions on how to protect their rights. See Letter from Comm. of Gen. Land Off. to the Register and Receiver of April 27, 1899, JX 114. This evidence of the circumstances surrounding the 1888 cession is uncontroverted by the plaintiff and compels the conclusion that the strip was severed from

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[87] See O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 15:

> Because the strip was a part of federal lands, but off the Indian and military reserves, it was not controlled by officials at Whiterocks or Fort Duchesne, nor by state, territorial, local or country [sic] authorities. This seemingly lawless territory "became the location of a tough class of squatters—men and women without means of existing except gambling, selling whiskey to Indians and prostitution." Indian agents and military men came to regret the strip's existence. It remained a wide-open area until it was sold by the government in May, 1906, at $1.25 per acre.

See also, Letter from Comm. of Ind. Aff., JX 50, *supra*; Letter from Acting Comm. of Ind. Aff. to Secretary of the Interior of Sept. 9, 1899, JX 116.

the Uintah Reservation in 1888. See *Rosebud Sioux Tribe v. Kneip, supra.*[88]

VIII. THE UNCOMPAHGRE RESERVATION

Contemporaneous with the 1888 cession, gilsonite veins were discovered on the Uncompahgre Reservation, touching off another drive to have the mineral lands ceded by the Indians.

> George W. Gordon was sent by the Interior Department in June [1889] to inspect the area. In his report of July 31, he described the area as containing second or third-rate pastureland, barren mountains, hills and alkaline patches. The report gave support to the rationale that the lands could be removed since "the Indians do not, and probably never will, need the lands embraced therein or make any use of them whatsoever."

O'Neil & MacKay, "A History of Uintah-Ouray Ute Lands," JX 483, at 16 (footnote omitted); see H.Rep.No.2967, 51st Cong., 1st Sess. LD 21 (1890). Almost immediately, Congress sought to excise a 12-mile strip of gilsonite lands from the Uncompahgre Reservation. See S. 1762, 51st Cong., 1st Sess., *reprinted in* S.Ex.Doc.No.157, 51st Cong., 1st Sess. (1890). On June 17, 1890, the bill was vetoed by President Harrison, who found it to be detrimental from a policy standpoint. See Veto Message of the President, June 17, 1890, LD 20. Three months later, S. 4242 was introduced "to change the boundaries of the Uncompahgre Reservation," see H.Rep.No.3305, 51st Cong., 2d Sess., LD 22 (1890), but it died at the end of the session. A similar bill, S. 574, was favorably reported by the Committee on Indian Affairs in February

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[88] This conclusion as a practical matter excludes the town of Gusher from the Uintah and Ouray Reservation. See Exhibit I-1A (map); Appendix B, *infra.*

of 1892, see S.Rep.No.240, 52d Cong., 1st Sess. (1892), as was H.R. 69, another bill to "change the boundaries of the Uncompahgre Reservation." See H.Rep.No.1076, 52d Cong., 1st Sess. (1892). Neither of the bills passed.

At the same time, it was apparent to Robert Waugh, Indian Agent at Fort Duchesne, that any plans for allotment at Uncompahgre would face difficulties. See letter of Agent Waugh to Comm. of Ind. Aff. of Dec. 19, 1892, JX 29. But concern for the gilsonite and other minerals easily out-weighed concern for the Utes in the minds of Washington officials. In 1893 the Secretary of the Interior secured the opinion of Assistant United States Attorney General Hall on the status of the Uintah and Uncompahgre lands. While Hall determined that the Uintah reservation was "owned" by its Indian residents,

> It is clear to my mind that the Uncompahgre Utes have not title to the lands they occupy; that they occupy these lands as a temporary reservation, until such time as the President may require them by virtue of the agreement, and the Act of 1880, to take their allotments within the limits of said reservation.

Letter from Asst. Atty. Gen. Hall to Secretary of the Interior of Oct. 23, 1893, JX 30, at 8.[89] Hall relied upon

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[89] Hall's opinion contradicted the views of the Commissioner of Indian Affairs Morgan that the Uncompahgres "owned", or held compensable title to, their lands, at least for the purposes of the Indian Leasing Act, Act of Feb. 28, 1891, ch. 383, 26 Stat. 794, I Kapp. 56, 57 (2d ed. 1904), LD 23, and could lease their lands for mining purposes, though mining operations might be undesirable for other reasons. Letter from Comm. of Ind.Aff. to Secretary of the Interior of Dec. 30, 1892, JX 36. Congress had already provided for compensating the Uintahs and the Uncompahgres for lands granted as a right-of-way to the Utah Midland Railway Co. Act of Mar. 3, 1887, ch. 368, 24 Stat. 548, I Kapp. 255-256 (2d ed. 1904), LD 14.

This contrast between the status of the Uintah and the Uncompahgre Reservations was to be relied upon again and again by those who

language in the Agreement of 1880, LD 11, which indicated that the Uncompahgre lands were reserved for the purposes of making allotments and a provision requiring that the allotted lands be paid for out of a fund generated from the sale of the Ute lands in Colorado at the rate of $1.25 an acre.

In 1894, three bills were introduced providing "for opening the Uncompahgre and Uintah reservations." H.R. 4511, 6557; see S.Rep.No.450, 53d Cong., 2d Sess., 4027 (1894).[90] Though these bills were not enacted,[91] the Indian Appropriations Act for that year included H.R. 6557, with changes:

> Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows:
>
> "Allotments in severalty of said lands shall be made as follows: To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a

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advocated the extinguishment of the Uncompahgre Reservation. *E.g.*, H.Rep.No.660, 53d Cong., 2d Sess., LD 30 (1894); 30 Cong.Rec. 107, 714-715, 718, 817, 831, (1897), LD 45.

[90] Pressure for the opening of both reservations was mounting. See *e.g.*, "Petition to President Cleveland from Certain Uintah County Residents," JX 32 (1894).

[91] Congressional debates on the bills focused more on the "rights" of those who had earlier located the gilsonite, asphaltum, etc. at Uncompahgre than upon the rights of the Utes whose reservation the minerals were located upon. See 26 Cong.Rec. 7032-7033, 7256-7260 (1894). The Commissioner of Indian Affairs recommended *against* passage of the bills. Report of the Comm. of Ind. Aff., 1894, JX 33, at 90.

section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided,* That, with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location: *And provided,* That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior *what portions of said reservation are unsuited or will not be required for allotments,* and thereupon such portions so reported *shall, by proclamation, be restored to the public domain* and made subject to entry as hereinafter provided."

Sec. 21. That the remainder of the lands on said reservation, shall, upon approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: Provided, That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances: *Provided,* That after three years actual and continuous residence upon agricultural lands from the date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not

commuted at the end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.

Sec. 23. That said commissioners shall receive six dollars per day each, and their actual and necessary traveling and incidental expenses while on duty, and to be allowed a clerk, to be selected by them, whose compensation shall be fixed by said commissioners, subject to the approval of the Secretary of the Interior: *Provided,* That the cost of executing the provisions of this Act shall not exceed the sum of sixteen thousand dollars, which sum is hereby appropriated for that purpose out of any moneys in the Treasury not otherwise appropriated.

Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 337-338, I Kapp. 546 (2d ed. 1904), LD 35. (emphasis added).

Agent Randlett soon informed the Secretary of the Interior that there were insufficient agricultural lands available on the Uncompahgre Reservation to fully comply with the intended allotment program. Randlett suggested that additional lands be made available on the more hospitable Uintah reservation. Letter of Agent Randlett to Secretary

of the Interior of Dec. 12, 1894, JX 35.[92] However, a three-man commission was appointed to carry out the 1894 Act provisions and began meeting with the Uncompahgre in January 1895. The Ute Commission struggled with a number of problems, including substantial Indian opposition to the Act's provisions.[93] The Commission's effort to carry out the 1894 Act failed. See H.Doc.No.191, 54th Cong., 1st Sess., LD 39 (1896); S.Doc.No.161, 54th Cong., 1st Sess., LD 41 (1896). The Commission was relieved of its duties on February 4, 1896, S.Doc.No.32, 55th Cong., 1st Sess., LD 46, at 3 (1897), while the Secretary sought additional funds to commence negotiations with the Utes at Uintah, see H.Doc.No.28, 54th Cong., 1st Sess., LD 40 (1896), which were appropriated in June. Act of June 10, 1896, ch. 398, 29 Stat. 321, 341-342, I Kapp. (2d ed. 1904), LD 42. By resolution of January 16, 1896, the House of Representatives asked of the Secretary the probable time for execution of statutes providing "for a restoration to the public domain of certain lands within the Uncompahgre Indian Reservation in the Territory of Utah." The Sec-

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[92] Capt. Randlett expressed another relevant view:

> I am of the opinion it will be unjust and it will be positively contrary to my sense of good faith on the part of the government to ask these Indians of the Uintah Reservation at the present time or in the near future to relinquish interest in their lands to any further extent than I have suggested. The minerals that have been or may be discovered on the remaining lands are the property of these Indians. The timber lands will eventually become very valuable and are their legal possessions; these possessions should not be taken from these Indians to their pecuniary disadvantage.

Id., JX 35 at 3-4. The Commissioner of Indian Affairs later concurred in Randlett's view. See Letter from Comm. of Ind. Aff. to Secretary of the Interior of Jan. 14, 1896, JX 51 at 13.

[93] See *e.g.*, Letter from Ute Commission to Comm. of Ind. Aff. of Mar. 22, 1895, JX 43, reporting that survey of Uncompahgre lands to identify surplus lands had been impossible due to heavy snow; Report of Agent Randlett, 1895, JX 47; Rept. of the Comm. of Ind. Aff., 1895, JX 49, at 32-33.

retary recommended appointment of another commission to negotiate with the Uncompahgres. See 1 Report of the Secretary of the Interior, 1896, H.Doc.No.5, 54th Cong., 2d Sess., JX 52, at xlviii-li.[94]

In the meantime, the Uncompahgre Reservation remained under pressure from trespassers and the "familiar forces" of local non-Indian interests.[95] The trespass problem worsened in 1897; the agency found that a number of reservation boundary markers had been moved, necessitating resurvey of the lines.[96] One party of trespassing prospectors was financed by the Governor of Utah, and others, in order to provoke litigation testing the legality

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[94] See Letter from Comm. of Ind. Aff. to Secretary of the Interior of Mar. 3, 1896, JX 54, at 2 (re: appropriations bill for Uncompahgre negotiations).

[95] *E.g.*, Letter from Agent Randlett to Comm. of Ind. Aff. of Sept. 16, 1896, JX 56 (even Governor, Sec'y. of State involved in mineral location at Uncompahgre Reservation); Letter of Agent Randlett, Feb. 27, 1896, article *Salt Lake Tribune*, Feb. 25, 1896 (opening of Uncompahgre lands demanded), JX 53; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Aug. 13, 1895, JX 46. Considerable distrust and anxiety arose among the Utes concerning "opening" of the reservations. See Report of Agent Randlett, 1896, JX 55.

[96] Letter from Agent Randlett to Comm. of Ind. Aff. of Jan. 19, 1897, JX 60; Letter from Comm. of Ind. Aff. to Agent Randlett of Feb. 11, 1897, JX 62. See also, Letter from acting Comm. of Ind. Aff. to Agent Waugh of May 5, 1892, JX 26; Letter from Agent Randlett to Comm. of Ind. Aff. of Feb. 22, 1897, JX 64; Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 24, 1897, JX 72; Letter from the acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 4, 1898, JX 97; Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 25, 1898, JX 101; Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of June 22, 1898, JX 105; Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior of Oct. 11, 1898, JX 110; Letter from Comm. of Ind. Aff. to Agent Myton of May 26, 1900, JX 120; Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior, July 28, 1900, JX 121; Letter from Comm. of Gen. Land Office to Comm. of Ind. Aff. of Mar. 11, 1902, JX 130.

of the reservation itself. Report of Capt. Day, 9th Cavalry, JX 70; Letter from Agent Randlett to Comm. of Indian Aff. of March 15, 1897, JX 69. Federal prosecution of trespassers was repeatedly recommended[97] and federal troops were requested to support Agent Randlett.[98]

After extensive debate, which dealt more with the disposition of the Uncompahgre mineral deposits than with the welfare of the Uncompahgres,[99] Congress enacted provisions that mandated the allotment and opening of the Uncompahgre Reservation:

> The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Ute Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservation or elsewhere in said State. *And all the lands* of said Uncompahgre Reservation *not theretofore alloted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States;* excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, I Kapp. 621 (2d ed. 1904), LD 49 (emphasis added).

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[97] *E.g.*, Telegram from Gen. Wheaton to Adj. Gen. of Mar. 14, 1897, JX 68; Letter from Comm. of Ind. Aff. to Ass't. U.S. Atty. of Sept. 9, 1897, JX 82.

[98] Letter from Agent Randlett to Comm. of Ind. Aff. of Jan. 13, 1897, JX 59; Letter from Comm. of Ind. Aff. to Secretary of the Interior of Jan. 30, 1897, JX 61; Letter from Comm. of Ind. Aff. to Agent Randlett of Mar. 6, 1897, JX 66; Letter of Comm. of Ind. Aff. to Secretary of the Interior of Mar. 6, 1897, JX 67; see also Letter from the Comm. of Ind. Aff. on Oct. 6, 1897, JX 86; of Oct. 27, 1897, JX 87; of Nov. 15, 1897, JX 88; of Oct. 1, 1897, JX 85.

[99] See Cong.Rec. 102-108, 712-720, 725, 814-821, 826-833, 1070, 1110-1120, 1130, 1208-1211, 1245, 1253, 1468 (1897), LD 45.

Allotment of the Uncompahgre Reservation was to be conducted under the 1897 Act, the 1894 Act and the 1880 Agreement, considered together. See Opinion of Ass't. Atty. Gen. Van Devante, 25 I.D. 97, JX 76 (1897).[100] It quickly became apparent that the allotment process at Uncompahgre could not be completed within the time allowed. When Agent Randlett reported on June 30, 1897, no allotments had yet been made. See Report of Agent Randlett *in* Rept. of the Comm. of Ind. Aff., 1897, JX 81, at 286.[101] The Uncompahgre Commission, James Jeffreys, Ross Guffin and Howell Myton, were directed to proceed with assignment of allotments under instructions approved August 27, 1897. See *id.;* Instructions to Uncompahgre Commissioners of Aug. 26, 1897, JX 77; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Aug. 26, 1897, JX 78; Letter from the Comm. of Ind. Aff. to the Uncompahgre Commission of Aug. 31, 1897, JX 79; Rept. of the Comm. of Ind. Aff. 1897, JX 75 at 92-93. Troubled by these events, the Uncompahgres sent a delegation to

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[100] Cf. Rept. of the Comm. of Ind. Aff., 1897, JX 75 at 92-93. Plaintiff asserts that the 1897 Act repealed the 1894 Act and any intent therein to restore the unallotted lands to the public domain was thereby negated. Plaintiff's Post-Trial Brief at 46-47. The 1897 Act arguably voided entry into gilsonite lands as provided for under the 1894 Act. See 30 Cong.Rec. 1208, LD 45, (1897). However, plaintiff cites no language indicating that Congress intended to preserve for the Indians anything more than the promised allotments as "an adequate fulcrum for tribal affairs." *DeCoteau v. District County Court*, 420 U.S. 425, 446, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975).

[101] Capt. Randlett commented further:

> It is true, as asserted in substance before Congress by an advocate for opening the Uncompahgre Reservation, men can be found that would make allotments to the Indians by shorthand process, but it is not believed that Congress intended or that the Secretary of the Interior will permit the wickedness of allotting lands on paper. . . .

Id. See also Rept. of the Secretary of the Interior, 1897, JX 89, at xli-xliii.

Washington, D. C.,[102] where they tentatively agreed to accept allotments on the Uintah Valley Reservation if adequate land could not be found at Uncompahgre. See Rept. of the Secretary of the Interior, 1897, H.Doc.No.5, 55th Cong., 2d Sess. at xlii-xliii. Even with tentative agreement by all three Ute bands to this allotment program,[103] it was clear to those involved that additional time was still needed. *Id.;* Letter from Acting Agent Cornish to Comm. of Ind. Aff. of Feb. 17, 1898, JX 93 (more time "absolutely essential to enable allotments to be made"). Deep snow and poor weather rendered the work of the Commission impossible for months.[104]

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[102] The Utes apparently paid their own way as well. See Letter from Acting Comm. of Ind. Aff. to Acting Agent Beck of Oct. 6, 1897, JX 86. The stated reason for the trip is significant:

> The Indians gave as a reason for desiring the delegation that *the lines of their reservation have been established* by a man who said he came from Washington *and now these lines were taken away*; that they had signed many papers, but Washington says now they were not good. But if their chiefs and headmen could stand face-to-face with the Secretary and hear the words spoken, and he said for them to do so, *they would take allotment.*

Telegram of J. Jeffreys, Uncompahgre Commissioners, to Comm. of Ind. Aff. of Oct. 5, 1897, *quoted in* O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483 at 21 (emphasis added). The greatest obstacle to allotment was not the boundary question; it was still the requirement that the Uncompahgres pay $1.25 an acre for their allotments. See Rept. of the Secretary of the Interior, 1897, JX 89, at xlii-xliii.

[103] See Letter of Acting Comm. of Ind. Aff. to J.W. Davenport, Esq. of Feb. 8, 1898, JX 92 (tentative agreement with Uintah, White River Utes to allow Uncompahgre allotments at Uintah Reservation); S.Doc.No.80, 55th Cong., 2d Sess., LD 51 (1898) (text of agreement).

[104] In its December 22, 1897 report the Commission complained:

> The distance from proper shelter to Indian settlements over this reservation varies from 10 to 60 miles, the majority of the settlements being between 40 and 60 miles, and with the thermometer registering from zero to 36° below zero, it will be seen

While the Indian Department had some success in pushing a six-month delay through the Senate,[105] the effort ultimately failed. The Uncompahgre Commission was so informed by telegram[106] and the "opening" went ahead on April 1, 1898 as scheduled. Federal troops were again called to the reservation, this time to keep order and prevent anyone from making unlawful claims.[107] The Uncompahgre Commission had failed to make a single allotment within the Uncompahgre Reservation prior to April 1. Rept. of the Comm. of Ind. Aff., 1898, JX 108, at 42, *in* H.Doc. No. 5, 55th Cong., 3d Sess. The Commission proceeded in May to make 75 allotments on the Uncompahgre Reservation, but the Commissioner of Indian Affairs doubted the legality of making Indian allotments after the April 1 opening date, the lands having become a part of the "public domain." *Id.* at 43. By separate legislation, Congress ultimately confirmed 83 allotments made within the Uncompahgre Reservation. See Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 940-41, I Kapp. 686 (2d ed. 1904), LD 61; Letter from Comm. of Ind. Aff. to Secretary of the Interior of Apr. 12, 1899, JX 113; Rept. of the Comm. of Ind. Aff., 1899, JX 117, at 43-44. 584 Uncompahgre allotments on the Uintah Reservation were finally ap-

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> that camping out, even if the commission was provided with a camping outfit, would be dangerous to the health of the commission. . . .

Quoted in Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 4, 1898, JX 98. One can only wonder as to how the Indians fared that winter, so far from "proper shelter."

[105] Letter from Acting Comm. of Ind.Aff. to F. Kreider, Esq. of Feb. 24, 1898, JX 95 (six-month extension approved by the Senate); Letter from Acting Comm. of Ind. Aff., JX 98, *supra*, note 100.

[106] Telegram of Comm. of Ind. Aff. to Comm. J. Jeffries of Mar. 31, 1898, JX 102.

[107] See Letter from Comm. of Ind. Aff. to Acting Agent Cornish of Apr. 6, 1898, JX 103; Letter from Secretary of War to the Secretary of the Interior of Apr. 8, 1898, JX 104.

proved in 1905. See Rept. of the Comm. of Ind. Aff., 1905, JX 323, at 146; Letter from Secretary of the Interior of July 7, 1905, JX 281.

At the urging of the Secretary of the Interior, and after lengthy debate, Congress had withheld the gilsonite and other mineral lands from entry, frustrating the major object of the opening of the Uncompahgre Reservation. Over a year following the "opening" not a single non-Indian homestead entry had been made upon the Uncompahgre Reservation. The Agent (and former Uncompahgre Commissioner), H. P. Myton, recommended that either the lands be returned to the Utes, or the gilsonite and other mineral lands be opened. Report of Agent Myton, 1899, JX 115. In the meantime, the Uncompahgres ranged into Colorado hunting for food. Letter from the Comm. of Ind. Aff. of Dec. 11, 1899, JX 118. The lands were not then returned, nor were the mineral lands opened to entry until 1906. See Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 998, IV Kapp. 17-18 (1913), JX 332 (even-numbered sections of mineral land opened); Interior Dept. Circular of June 25, 1906, 34 I.D. 649 (1907), JX 333.

The plaintiff Ute Indian Tribe argues herein that the original exterior boundaries of the Uncompahgre Reservation remain intact notwithstanding events that transpired at the turn of the century. Review of the applicable legislation, its legislative history and contemporaneous as well as subsequent interpretations of the legislation and of the status of the reservation compel this Court to conclude that the boundaries of the Uncompahgre Reservation set forth in the Executive Order of January 5, 1882 were extinguished by Congress under the Act of June 7, 1897.

The express terms of the Act of August 15, 1894, 28 Stat. 286, 337, LD 35, expressed in plain language congressional intent to disestablish the Uncompahgre Reservation following the distribution of allotments in severalty; the "surplus" unallotted lands were to be "restored

to the public domain." 28 Stat. at 337. Express language restoring most of an Executive Order Indian Reservation to the public domain is plainly suited to disestablishment. In *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), a similar statute "vacated and restored to the public domain" the north half of the Colville Reservation in the State of Washington, diminishing the reservation to that extent.[108] *Id.*, 368 U.S. at 354-356, 82 S.Ct. at 426-427. The proponents of the 1894 Ute legislation repeatedly characterized the reservation as a temporary one, intended to endure only until agricultural and grazing lands could be allotted to the Uncompahgre Utes. Correspondence contemporaneous with the establishment of the 1882 reservation supports the proponents' argument. For example, in a letter from the Commissioner of Indian Affairs to the Secretary of the Interior of July 18, 1884, it was said:

> As a matter of fact the Uncompahgre Reservation so-called, was set apart simply to enable the Department to control without interference from white settlers, a sufficient quantity of land to give each individual Indian the quantity which it was agreed he should have by the terms of the Ute agreement [of 1880]. I do not think it was intended as a permanent reservation, and I presume that whenever the Indians are settled upon their allotments, the reservation as present existing will be discontinued.

Quoted in Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs, 1931, JX 426, at 4. The 1894 Act was intended to fulfill that purpose, releasing the remaining lands for non-Indian exploitation. The plaintiff correctly observes that the 1894 Act was not successfully

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[108] Act of July 1, 1892, ch. 140, 27 Stat. 62, 63, I Kapp. 441 (2d ed. 1904). See also *United States v. Pelican*, 232 U.S. 442, 445-446, 34 S.Ct. 396, 397, 58 L.Ed. 676 (1914).

executed; allotments were not assigned, nor were the gilsonite deposits opened to lawful mining.

The reservation instead was opened under the provisions of the Act of June 7, 1897, 30 Stat. 62, 87, LD 49. The 1897 Act did not precisely mirror the "public domain" language of the 1894 Act. Plaintiff argues that the 1897 Act repealed the 1894 Act, defeating any "baseline purpose" of disestablishment arising from the public domain language. See Plaintiff's Post-Trial Brief at 45-47. However, the 1897 Act provides that the unallotted lands of the reservation were to "be open for location and entry under all the land laws of the United States," excepting lands containing gilsonite and related minerals. 30 Stat. at 87. The language is not identical, but the result under the 1897 Act would be the same as under the 1894 Act as far as the reservation is concerned. Restoring land "to the public domain" as a practical matter opens the land to location and entry under "all of the land laws" of the United States; "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U.S. 761, 763, 23 L.Ed. 769 (1875). Statements in the congressional debate on the 1897 Act indicate that the main thrust of the 1897 Act was to mandate the execution of the purposes of the 1894 Act by the Executive Branch. See 30 Cong.Rec. 716-717, 817, 826 (1894), LD 45.

The significant change enacted in the 1897 Act dealt with the gilsonite and related mineral lands; limited entry was permitted under the 1894 Act, but was forbidden under the 1897 Act. To this extent the 1897 Act repealed the 1894 Act, as plaintiff asserts. The manner of disposition of these lands is, however, irrelevant to the question confronted here because in either instance, Congress intended that from the date of "opening" under either act the unallotted lands would no longer be part of an Indian reservation.

The Tribe relies upon statements in congressional debates on the legislation for support for a narrower view of the 1897 Act. Clearly the legislation raised doubts and inspired opposition. See 30 Cong.Rec. 712-720, 814-821, 826-833 (1897) LD 45. The simple fact is that those who questioned, doubted and opposed the legislation *lost;* the "familiar forces" prevailed, regardless of the apparent fairness or suitability of the legislation as far as the Indians were concerned. Plaintiff cites no statement by the proponents of the 1897 Act indicating that the Uncompahgre Reservation was intended to survive the opening, and this Court has found none.

That Congress was "satisfied that the retention of allotments would provide an adequate fulcrum for tribal affairs." *DeCoteau v. District County Court,* 420 U.S. 425, 446, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975), is borne out by the subsequent events surrounding the Uncompahgre lands. Counsel for the defendant state and counties have catalogued the past-tense legislative references to "the former Uncompahgre Reservation" in the briefs.[109]

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[109] See Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 998 LD 91 ("... the former Uncompahgre Indian Reservation.") H.Doc.No.33, 58th Cong., 1st Sess., LD 92, at 1-2, 10 (1903); S.Doc.No.159, 58th Cong., 3d Sess., LD 101 at 16(1905); 39 Cong.Rec. 1181 (Jan. 21, 1905) (remarks of Rep. Howell), LD 103; Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 940, LD 61; Act of Apr. 30, 1908, Pub.L., 60-104, 35 Stat. 70, 95, LD 135; S.Rep.No.1002, 63d Cong., 3d Sess., LD 150, (1915) ("Gilsonite Lands Within the Former Uncompahgre Indian Reservation, Utah"); H.Rep.No.642, 64th Cong., 1st Sess., LD 151 (1916); 53 Cong.Rec. 7862 (May 12, 1916) (remarks of Rep. Howell); H.Rep.No. 2399, 74th Cong., 2d Sess., LD 174 (1936); S.Rep.No.749, 80th Cong., 1st Sess., LD 184 (1947); H.Rep.No.1372, 80th Cong., 2d Sess., LD 186, at 4 (1948); Act of Mar. 11, 1948, Pub.L. 80-440, 62 Stat. 72, 77, LD 187.A number of these "legislative" past-tense references are quotations from administrative materials. This does not deprive them of their persuasiveness; it reflects congressional concurrence in the consistent administrative view that the "old" or "former" Uncompahgre Reservation did not survive its opening under the 1897 Act. See *e.g.*,

The treatment of the Uncompahgre lands following opening on April 1, 1898 confirms the above interpretation of the 1897 Act with startling uniformity. The record in this case offers no jurisdictional history contrary to the view that the 1882 boundaries were dissolved in 1897. Far from evidencing continuing recognition of the whole reservation, the administrative treatment of the lands following April 1, 1898 reflects the concern that even the few allotments reserved to the Uncompahgres would soon fail, leaving the Indians with nothing. The proposed solution was to consolidate the Uncompahgre band on allotments within the Uintah Valley Reservation, abandoning the 1882 lands altogether.[110] In large part, the Uncompahgres were given allotments on the Uintah Valley Reservation following agreement by the Uintah and White River Bands to the arrangement.[111] See Act of June 7, 1897, ch. 3, 30 Stat. at 87, I Kapp. 621, LD 49. Though some Indians continued

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Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, 1931, JX 426; Letter of Comm. of Ind. Aff. to the Secretary of the Interior of June 12, 1933, JX 428; Ann. Rept. of the Comm. of Ind. Aff., 1898, JX 108, at 43; Ann. Rept. of the Comm. of Ind. Aff. to the Secretary of the Interior of April 12, 1899, JX 113; same of July 27, 1903, JX 168.

[110] See Letter from Acting Agent Mercer to Comm. of Ind. Aff. of Sept. 9, 1903, JX 174; Letter from Agency Clerk to the Agent of Aug. 31, 1903, JX 173; Letter from the Comm. of Ind. Aff. to Acting Agent Mercer of July 28, 1903, JX 170; Letter from Acting Agent Mercer to Comm. of Ind. Aff. of Apr. 20, 1904, JX 180; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Apr. 30, 1904, JX 181; Letter from the Comm. of Ind. Aff. to Agent Hall of July 6, 1904, JX 186. See Letter from the Comm. of Ind. Aff. to Agent Hall of Mar. 13, 1905, JX 232. On July 1, 1904, the Secretary of the Interior authorized the allotment of lands for the Uncompahgres on the Uintah Valley Reservation. Letter from Secretary of the Interior to the Comm. of Ind. Aff. of July 1, 1904, JX 185.

[111] See H.Doc.No.80, 55th Cong., 2d Sess., LD 51 (1898). The Commissioner of Indian Affairs submitted a schedule of 591 Uncompahgre allotments at Uintah for secretarial approval by letter of July 15, 1905, JX 287. See also S.Rep.No.951, 57th Cong., 1st Sess., LD 69, at 3 (1902).

to assert the claim that the 1882 reservation still existed, the Bureau of Indian Affairs apparently made a formal determination in 1929 that the reservation no longer existed.[112] Similarly, the Justice Department, appearing herein as *amicus curiae* representing the United States, has remained silent on the continued reservation status of the 1882 lands. In other proceedings, the United States has steadfastly denied the reservation's continuing existence.[113]

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[112] See "Statement Concerning the Uncompahgre Grazing Reserve," Feb. 6, 1943, JX 451, at 4:

> While the Ute Indians maintained that they still had a legal claim to the 1,800,000 acres of the old Uncompahgre Reservation, the Office of Indian Affairs had determined in 1929 that the action of Congress in 1897 returning the unallotted lands of the reservation to the public domain had extinguished the legal claims of the Indians to the land, . . .

See also, Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs, 1931, JX 426, at 12:

> It is apparent from the foregoing that the Uncompahgres, in accordance with the 1880 agreement, were entitled only to allotments, and had no right to the surplus land within the Executive Order Reservation, . . . It unquestionably would have been greatly to the interest of the Indians, from a financial standpoint, if they had been recognized as owners of the 2,000,000 acres included in the Executive Order Reservation. But for the Government to have taken such position would have been entirely contrary to the facts.

[113] In *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L.Ed.2d 458 (1980), the Justice Department filed a memorandum on behalf of the Secretary of the Interior which commented as follows:

> [I]n the view of the United States, the Tribe's claim that the Uncompahgre Reservation survives is both erroneous and irrelevant.
>
> The fact is that, for several decades at least, the Department of the Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. . . .
>
> We simply list some of the impediments to the Tribal claim:

The plaintiff finds little support in the circumstances surrounding the opening of the 1882 reservation; the Tribe's interpretation of events and language is strained at best.

In this Court's opinion, any colorable ambiguity in the historical record is laid to rest by the express language used by Congress in the Act of March 11, 1948, Pub.L. 80-440, 62 Stat. 72, VI Kapp. 375-381 (1980), LD 187. That Act provides as follows:

> *Be it enacted* . . . , That the exterior boundary of the Uintah and Ouray Reservation in Grand and Uintah Counties, in the State of Utah, for the benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation, is hereby extended to include the following area:
>
> * * * * * * *

Omitted here is the legal description of the body of lands known as the Hill Creek Extension of the Uintah and Ouray Reservation. The described lands fall largely within the original boundaries of the Uncompahgre Reservation. If that reservation still remained intact, what purpose was served by the metes-and-bounds description of the "exte-

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(1) Both in the abortive 1894 Act . . . and in the 1897 Act . . ., Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name, denying them any claim to the proceeds derived from the sale of the surplus lands opened to entry; (2) in 1899 and 1903, after the Reservation was opened, it was referred to as "the former Uncompahgre Indian Reservation" . . .; (3) in 1948, Congress extended the Uintah and Ouray Reservation by including lands situated within the boundaries of the former Uncompahgre Reservation, a futile act if the latter reservation still subsisted . . . (6) at no time since 1897 does it appear that the Department of the Interior (or any other government agency) has treated the Reservation as still in existence . . .

Memorandum for the Petitioner in Response to the Motion of the Ute Indian Tribe, *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L.Ed.2d 458 (citations omitted).

rior boundary" of the Uintah and Ouray Reservation by Congress in the 1948 Act?

The legislative[114] and administrative history[115] that culminated in the 1948 legislation consistently regards the area of grazing lands set apart in the Hill Creek Extension as the "new" Ute Reservation, a restoration of a portion of the "old" Uncompahgre Reservation to Indian use. For example, in response to an inquiry by the Interior Department's Director of Grazing regarding the status of the "old" reservation, Assistant Commissioner of Indian Affairs William Zimmerman, Jr., reported that "it is the belief of this office that the undisposed of lands within the former Uncompahgre Indian Reservation, Utah, have the status of public lands of the United States," temporarily withdrawn in aid of legislative efforts resulting in the 1948 Act, Letter from Ass't. Comm. of Ind. Aff. to Director, Div. of Grazing of Aug. 8, 1939, JX 447.

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[114] See H.Rep.No. 1372, 80th Cong., 2d Sess., LD 186 (1948); S.Rep.No.749, 80th Cong., 1st Sess., LD 184 (1947); see also S.Rep.No.1188, 78th Cong., 2d Sess., JX 182 (1944); H.Rep.No.143, 78th Cong., 1st Sess., JX 181 (1943); S.Rep.No.243, 77th Cong., 1st Sess., JX 180 (1941); H.Rep.No.70, 77th Cong., 1st Sess., JX 179 (1941); H.Rep.No.2399, 74th Cong., 2d Sess., JX 174 (1936).

[115] Office of Indian Affairs Memorandum, JX 426, *supra*; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of June 12, 1933, JX 428; *Id.*, JX 429; Memorandum by the Director of Forestry, JX 433; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of July 19, 1925, JX 435; Letter from Ass't. Comm. of Ind. Aff. to the Secretary of the Interior of Nov. 17, 1936, JX 436; Letter from the Director of Forestry to Agency Superintendent of Dec. 4, 1936, JX 437; Report on Grazing Resources on Uintah and Ouray Reservation, JX 443 (Nov. 1938); Letter from Agency Superintendent to Bill Stringham of Mar. 21, 1939, JX 445; Letter from Agency Superintendent to the Comm. of Ind. Aff. of Oct. 18, 1939, JX 448; Letter from the Regional Forester to the Agency Superintendent of Oct. 25, 1939, JX 449; Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of June 19, 1941, JX 450, *contra*, Memorandum of Feb. 6, 1935, JX 434.

The same opinion is expressed in the committee reports explaining the enacted bill. See H.Rep.No.1372, 80th Cong., 2d Sess., LD 186 (1948); S.Rep.No. 749, 80th Cong., 1st Sess., LD 184 (1947). The purpose of the bill, explains the House Committee Report, was "to enlarge the Uintah and Ouray Reservation by some 510,000 acres," LD 186, at 2, and, indeed, that is what the 1948 Act did. It did not establish a grazing reserve within an existing Indian reservation[116] because no such reservation remained in existence.[117]

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[116] Cf. Plaintiff's Post-Trial Brief at 55. The Tribe's rationale regarding the 1948 Act is tenuous and unconvincing. The Tribe is correct when it points out that "title ownership to the beneficial Indian interest [in lands] is different from reservation status." *Id.*, at 54. Congress understood this at that time, as evidenced by the fact that it defined "Indian Country" by reservation boundaries rather than title in that same year. Act of June 25, 1948, ch. 645, 62 Stat. 683, 757 *codified at* 18 U.S.C. § 1151(a). The 1948 Act *extends the boundaries* of the Uintah and Ouray Reservation; *title to the Hill Creek Extension was restored to the Tribe by other means*, such as purchase using tribal funds. H.Rep.No.1372, LD 186, *supra*, at 2.

The distinction between title and territorial boundaries makes it unnecessary for this Court to reach the question of whether lands within Executive Order Indian Reservations may be expropriated by the Government without obligation to compensate the affected Indians. Cf. *Northern Paiute Nation v. United States*, 634 F.2d 594, 601-604, (Ct.Cl.1980); *Ute Indians v. United States*, 330 U.S. 169, 176, 67 S.Ct. 650, 653, 91 L.Ed. 823 (1947); *Sioux Tribe v. United States*, 316 U.S. 317, 331, 62 S.Ct. 1095, 1101, 86 L.Ed. 1501 (1942); Note, 69 *Yale L.J.* 627 (1960).

[117] Other circumstances surrounding the 1882 reservation lands harmonize with this conclusion: For example, (1) in 1965, the Ute Indian Tribe stipulated to a settlement of its claim before the Indian Claims Commission that the United States failed to provide the Uncompahgre Band with a reservation pursuant to the Agreement of 1880. 14 Ind.Cl.Comm. 707 (Dkt. No. 349, 1965). While the *stare decises* effect of a settlement agreement is necessarily extremely limited, the claim itself is indicative of the Tribe's prior understanding of historical events. (2) The 1882 boundaries do not appear on any recent map exhibit offered to this Court. (3) Article I of the Ute Tribal Constitution, L.D.

Agent Myton understated the situation when he wrote in his report for August 21, 1899 that "I think the Uncompahgre Indians have been treated very badly," JX 117, at 351. The reservation, which had been created for the purpose of providing allotments to the Uncompahgre Utes under the Agreement of 1880, was restored to the public domain at the insistance of non-Indian interests before a single allotment had been made. Fifty years passed before a viable Indian land base was re-established in the area

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176, speaks of the Ute territory as including the 1882 reservation but does so "except as otherwise provided by law," see page 2, *supra*, rendering the language ambivalent at best. The works of learned scholars mirror the view that the conclusion that the 1948 boundaries rather than the 1882 boundaries define the extent of Ute territory in that area. See *e.g.*, O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 37 (1977). (4) Bills introduced prior to 1948, though not enacted, uniformly speak of extending the boundaries of the Uintah and Ouray Reservation to include the Hill Creek grazing lands. See *e.g.*, H.R.9156, 74th Cong., 2d Sess.; H.Rep.No.2399, 74th Cong., 2d Sess., LD 174; beginning in 1965 the State of Utah began selecting indemnity school lands within the 1882 boundaries as well as elsewhere. (5) Under Utah's Enabling Act, Act of July 16, 1894, § 6, ch. 138, 28 Stat. 107, 109, LD 34, such selection is not permissible unless the 1882 Uncompahgre Reservation "shall have been extinguished and such lands [have been] restored to and become a part of the public domain." See *Andrus v. Utah*, 446 U.S. 500, 502-503 & n.1, 100 S.Ct. 1803, 1804-1805, 64 L.Ed.2d 458 (1980). (6) Rather than providing for a sum-certain payment to the Uncompahgre Band for the expropriation of the unallotted lands, or providing that the proceeds from the disposition of the unallotted lands were to be credited to the Utes by the U.S. Treasury, the 1897 Act makes no provision for paying the Uncompahgres at all. Restoration of Executive Order reservation lands to the public domain with no provision for payment of the Indians has been held to accomplish disestablishment of the restored lands. See *Seymour v. Superintendent*, 368 U.S. 351, 354-356, 82 S.Ct. 424, 426-427, 7 L.Ed.2d 346 (1962); *United States v. Pelican*, 232 U.S. 442, 445-446, 34 S.Ct. 396, 397, 58 L.Ed. 676 (1914).

None of these factors standing alone could conclude the ultimate question of the Uncompahgre boundaries. Each factor, however, generates an additional inference that the Uncompahgre Reservation was disestablished by Congress in 1897.

by the 1948 Act. That Act, and not the Executive Order of January 5, 1882, defines the territorial extent of the plaintiff's reservation in the vicinity of the former Uncompahgre Reservation. Based upon the express language of the 1897 Act, its legislative history, contemporaneous and subsequent legislative and administrative interpretations of its effect, and the jurisdictional history of the 1882 lands this Court is compelled to conclude that the 1882 Uncompahgre Reservation was disestablished by Congress pursuant to the Act of June 7, 1897.[118] *Rosebud Sioux Tribe*

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[118] This conclusion is not founded upon a simple preponderance of the evidence. The legislative and historical materials have been evaluated pursuant to the fundamental principle that doubtful expressions in legislation affecting Indians are to be construed in their favor. See *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 484, 99 S.Ct. 740, 753, 58 L.Ed.2d 740 (1979); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977); *Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7, 96 S.Ct. 1793, 1796, 48 L.Ed.2d 274 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 366-67, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760, 18 L.Ed. 667 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832) (J. McLean, concurring). With the benefit of hindsight, the Congress may have been better advised to have treated the Uncompahgre Reservation differently than it did. But this Court cannot now rewrite the statutes.

> For the courts to reinstate the *entire* reservation, on the theory that retention of more allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

DeCoteau v. District County Court, 420 U.S. 425, 447, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1775). In the 1897 Act Congress spoke clearly.

v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *Seymour v. Superintendent*, 368 U.S. 351, 354-56, 82 S.Ct. 424, 426-427, 7 L.Ed.2d 346 (1962).

IX. THE UINTAH RESERVATION

Concurrent with the drive to open the Uncompahgre Reservation was a similar effort to negotiate an agreement with the Uintah and White River Bands providing for the allotment of their lands and the cession of the unallotted "surplus" acreage. Bills were introduced in Congress in 1894 providing for the allotment and opening of both reservations. *E. g.*, S. 1887, H.R. 4511, H.R. 6557, 53d Cong., 2d Sess. (1894); See Rept. of the Secretary of the Interior, 1894, JX 37, at 90, 469; S.Rep.No.450, 53d Cong., 2d Sess., LD 27 (1894); H.Rep.No.660, 53d Cong., 2d Sess., LD 30 (1894). As observed at pages 48-49, *supra*, the provisions of H.R.6557 were substantially included in the Indian Appropriations Act for 1894 as sections 20-23. See Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 337-338, I Kapp. 546 (2d ed. 1904), LD 35. Under the provisions of this Act a distinction appeared between the legislative approach to the Uncompahgre Reservation and the approach to the Uintah Valley Reservation. While section 20 of this Act ordered the appointment of a commission to proceed directly with allotment of the Uncompahgre lands, section 22 provided as follows:

> Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such

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"Some might wish they had spoken differently, but we cannot remake history." *Id.* at 429, 95 S.Ct. at 1085.

> Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.

The rationale for this contrasting treatment of the Uintah Reservation is expressed in House Report No. 660, LD 30, at 1-3:

> The rights of the Indians upon the Uintah Reservation differ from those of the Indians upon the Uncompahgre Reservation. The Uncompahgre Indians have no title to any of the lands within the reservation, nothing more than the privilege of temporary occupancy. . . .
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> * * * * * *
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> As to the Uintah Indians the Assistant Attorney-General finds that the Indians are the owners of the lands within the reservation, because under the Act of Congress of May 5, 1864 (13 Stat. 64 [LD 4]), it was provided that the lands within the Uintah Reservation should be "set apart for the permanent settlement and exclusive occupation of the Indians." In order, therefore, to make available for settlement any portion of the lands within the Uintah Reservation, it is first necessary to obtain the consent of the Indians residing thereon. Accordingly, the bill provides that the commissioners appointed shall treat with the said Indians for the purpose of obtaining a relinquishment of their title to any lands not needed for allotment to Indians.

See also, Letter from Ass't. Atty. Gen. Hall to the Secretary of the Interior of Oct. 23, 1893, JX 30; page 48 & note 89, *supra*. Far from unilaterally restoring all but the alloted lands to the public domain for wholly non-Indian

exploitation, as was done at Uncompahgre, congressional intent in 1894 as to the Uintah Reservation pursued a different goal.

> If the consent of the Indians upon the Uintah Reservation can be obtained, by which they will accept allotments of land in severalty, and the remainder of the lands is sold and the proceeds derived are used for the benefit of the Indians, this condition will be much better than it is at present. These Indians have already made considerable progress toward civilization, and are entirely competent to receive lands in severalty, and are in a condition to reclaim and improve them. *If the residue of the lands are settled by whites the Indians will be more directly brought in contact with civilization and be able to make greater progress by the example thus afforded them.*

H.Rep.No.660, 53d Cong., 2d Sess., LD 30, at 3 (1894) (emphasis added).[119] Though primary attention was directed

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[119] In *Mattz v. Arnett*, 412 U.S. 481, 496, 93 S.Ct. 2245, 2253, 37 L.Ed.2d 92 (1973), the Supreme Court, indicated that pursuant to the General Allotment Act of 1887, 24 Stat. 388, LD 13, "Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways." Allotment under such legislation, *Mattz* ruled, "is completely consistent with continued reservation status." *Id.* at 497, 93 S.Ct. at 2254. The Supreme Court had observed in an analogous situation in *Seymour v. Superintendent*, 368 U.S. 351, 356, 82 S.Ct. 424, 427, 7 L.Ed.2d 346 (1962) that the legislation

> "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Congressional intent regarding the Uintah Reservation in 1894 was far more consistent with its intent in *Seymour v. Mattz* than it was with its intent regarding the Uncompahgre Reservation or the Lake Traverse Reservation in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). In 1894 Congress engaged in ex-

to restoring the mineral lands at Uncompahgre to non-Indian entry, see 26 Cong.Rec. 7032-7033, 7256-7260 (June 30, 1894), LD 33, there was some pressure to open the Uintah Reservation as well.[120] Under the Indian Appropriations Act for 1896 an additional commission was directed to negotiate with, among others, "the Indians residing upon the Uintah Reservation in the State of Utah, for the surrender of any portion of their respective reservations, or for such modification of existing treaties as may be deemed desirable by said Indians and the Secretary of the Interior; . . ." Act of June 10, 1896, ch. 398, 29 Stat. 321, 341-342, LD 42.[121]

Progress on the negotiations was slow to commence. In a report to the Senate dated April 8, 1897, the Commissioner of Indian Affairs stated:

> As a matter of fact, there was but very little correspondence between this office and the [Ute] commission directly relating to the negotiations with the Indians of the Uintah Reservation. It was made the

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tensive debate on the proper means to "civilize" the Indians, including civilization by example:

> Then I want to say again the Indians, like white people, learn more by example than by precept. Therefore, I shall favor . . . the interspersing of white settlement all through these Indian reservations, right alongside of the Indians; not to deprive them of any rights which they have, and not in any manner to endanger the rights of the Indians in their allotments. . . .

26 Cong.Rec. 6236 (June 13, 1894) (remarks of Rep. Coffeen), LD 32. See also *id.* 6234-6253, 7617, 7682-7708, 8263-8271, 9251-9253.

[120] For example, the Governor and Legislative Assembly of the Territory of Utah sent petitions to Congress on the subject. 26 Cong.Rec. 2575-2576 (Mar. 5, 1894), LD 28.

[121] The commission was appointed and sent into the field, see Letter from the Comm. of Ind. Aff. to J. P. Noonan, Esq. of Mar. 22, 1897, JX 71. See also H.Doc.No.248, 54th Cong., 1st Sess., LD 40 (1896) (appropriations for execution of § 22 of the 1894 Act requested; 32 Cong.Rec. 648-652 (1899), LD 60 (progress of 1896 commission).

> first duty of the commission to deal with the Uncompahgre Indians in accordance with section 20 of the Act [of 1894]. Indeed, the work of the commission never progressed beyond that point, and about all of the correspondence with them related to the Uncompahgres—the allotment of lands in severalty to them and the contemplated restoration to the public domain of the surplus not needed for allotment.
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> [T]hey were not expected to undertake the negotiations with the Uintah Indians until they had finished their labor with the Uncompahgres.

S.Doc.No.32, 55th Cong., 1st Sess., LD 46, at 2-3 (1897), JX 73, at 3. See H.Doc.No.101, 54th Cong., 1st Sess., LD 39 (1896) ("Uncompahgre Indian Reservation"). A month later, Senator Rawlins of Utah introduced S. 1883, a bill creating a new commission to make allotments in severalty to the Indians at the Uintah Reservation and to obtain the cession of any unallotted lands. 30 Cong. Rec. 880 (May 4, 1897), LD 47. Rep. King of Utah introduced an identical bill in the House, H.R. 7760. 31 Cong.Rec. 1486 (Feb. 5, 1898), LD 50. See H.Rep.No.1172, 55th Cong., 2d Sess., LD 53, (1898).[122] The bills were enacted as the

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[122] The House Report states the bill's purpose in plain terms:

> The bill merely provides for the appointment of a commission . . . to allot lands to the Indians and obtain by a treaty a cession from them to the Government of the residue of the land upon the reservation. If the Indians refuse to take allotments or to cede any portion of the reservation, then this measure becomes inoperative. On the other hand, if the Indians receive the commissioners, accept the allotments in severalty and join in a treaty of cession to the Government, then, . . . if approved the Indians will be benefited, and the title . . . held by the Indians will be extinguished, and the lands not occupied by them will become a portion of the public domain of the United States.
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> * * * * * *
>
> In order, therefore, to make available for settlement any portion

Act of June 4, 1898, ch. 376, 30 Stat. 429, I Kapp. 642-43 (2d ed. 1904), LD 54 (see Appendix A for text).[123]

Negotiations on allotment with the Uintah and White River Utes were a total failure. The White River Band particularly was unalterably opposed to the allotment and cession of the Uintah Reservation lands. *E. g.*, Letter from Acting Agent Beck to the Comm. of Ind. Aff. of Sept. 1, 1897, JX 80. After holding meetings with "individual and influential" Uintah and White River Utes, Commissioner Ross Guffin wrote:

> The Indians were unanimous and determined in their opposition to making cession to the government of any of their lands and to allowing an Uintah or White River Indian to take and hold an allotment in severalty on said reservation.

Letter from Comm. R. Guffin to the Comm. of Ind. Aff. of Jan. 7, 1899, *quoted in* JX 483, at 26.

A White River and Uintah Ute delegation travelled to Washington in November, 1898, emphasizing their opposition to the congressional proposal:

> Our land is small and we do not want to sell it to anyone. We do not want any commission sent there; we are opposed to that. We have no more land than we want ourselves for our own use.

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of these lands it is necessary to obtain consent of the Indians by treaty or otherwise.

H.Rep.No.1172, *supra*, at 2. See also 31 Cong. Rec. 511, 5155-5156, 5182-5183 (1898), LD 58, 59.

[123] The Uncompahgre Commission members were appointed as the Uintah Commission on July 14, 1898. Rept. of the Comm. of Ind. Aff., 1898, JX 108, at 36. The Uintah Commission received its instructions by letter of Aug. 6, 1898, JX 107, from the Commissioner of Indian Affairs.

Statement of Sasanuckit, *et al.*, of November 24, 1898, *quoted in* JX 483, at 25-26 & n. 130.

In the meantime, the Office of Indian Affairs had begun the practice of leasing parcels of land on the Uintah Reservation for grazing and mining purposes. See O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 23-26 & nn. 110-134 (1977).[124] Leasing on the Uintah Reservation quickly aroused controversy; Senator Rawlins of Utah saw leasing as a major stumbling block in the path of his own legislative proposals, which sought to reduce the Uintah Reservation to merely its northeast corner, permitting the sale of the remainder. See S. 145, 57th Cong., 1st Sess. (1902) (The text of the bill is reproduced in S.Doc.No.212, 57th Cong., 1st Sess., LD 68, at 3-4 (1902).). Pressure from interested lessors rather than the Indians' own desires was perceived to be at the root of Indian opposition to the opening of the Uintah Reservation.[125] Hearings on leasing on the Uintah Reservation were

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[124] See also Letter from Comm. of Ind. Aff. to Agent Waugh of Mar. 1, 1892, JX 24; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Apr. 23, 1892, JX 25. Rept. of the Comm. of Ind. Aff., 1901, JX 125, at 81.

The Interior Department, anticipating the cession negotiations directed by Congress, stated as a matter of policy that no leases for any purpose on the Uintah Reservation would be approved. Letter from Comm. of Ind. Aff. to Acting Agent Cornish of Mar. 5, 1898, JX 100. Subsequent leasing and contract proposals were stalled by the Commissioner's office. *E. g.*, Letter from Acting Comm. of Ind. Aff. to Agent Myton of Oct. 10, 1898, JX 109. See also, S.Doc.No.154, 57th Cong., 1st Sess., LD 66 (1902).

[125] See *e. g.*, "Leasing of Indian Lands," Hearings, Sen. Comm. of Ind. Aff., S.Doc.No.212, 57th Cong., 1st Sess., LD 68 at 5:

THE CHAIRMAN: Mr. Rawlins [of Utah] says that the effort to

held, see "Leasing of Indian Lands," Hearings, Sen. Comm. on Ind. Aff., S.Doc.No.212, 57th Cong., 1st Sess., LD 68 (1902), and documents were requested from the Interior Department. See S.Doc.No.154, 57th Cong., 1st Sess., LD 166 (1902); Letter from the Comm. of Ind. Aff. to Sen. Wm. Stewart, Chmn., Sen. Comm. on Ind. Aff. of Mar. 4, 1902, JX 126. At the hearings, Indian Affairs Commissioner Jones commented,

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> treat with [the Utes] failed several times. How is that?
>
> COMMISSIONER JONES: It has failed twice to my knowledge.
>
> SENATOR PLATT, of Conn.: What do they want?
> COMMISSIONER JONES: They do not want anything except to let it remain as it is.
>
> SENATOR RAWLINS: They will not agree at all. There has been so much agitation by people interested that we can never set any agreement with them. It is not because they do not know what their own interests are, but for other reasons it is impossible.
>
> THE CHAIRMAN: Speculators, persons wanting the land, are operating upon them?
>
> SENATOR RAWLINS: They are operating upon them constantly.
>
> SENATOR CLARK, of Mont.: They are trying to get a lease from them now.
>
> * * * * * *
>
> SENATOR PLATT, of Conn.: But in all of the negotiations we have had with them they have simply stood mute.
>
> COMMISSIONER JONES: No; they do not want to talk sale at all.
>
> THE CHAIRMAN: Has there been a cash offer made to these particular Indians?
>
> COMMISSIONER JONES: I do not know, Senator. They refuse to talk about it.

See also, *Deseret Evening News*, Mar. 7, 1902, JX 129 (Sen. Rawlins introduced bill prohibiting mineral leasing on Indian reservations); *Deseret Evening News*, Mar. 6, 1902, JX 128 (Florence Mining Co. lease on Uintah Reservation to be investigated).

> There is a sort of feeling among the ignorant Indians that they do not want to lose any of their land. That is all there is to it; and I think before you can get them to agree to open the reservation, you have got to use some arbitrary means to open the land.

S.Doc.No.212, LD 68, *supra*, at 5. The Utah congressional delegation eagerly sought such arbitrary means. Rep. George Sutherland spoke at the hearings, arguing that the Utes did not really "own" their reservation at Uintah and therefore that Ute consent need not be obtained to accomplish a cession. Referring to the termination of the four early Indian farm reserves, which Congress restored to the public domain in 1878,[126] Sutherland asserted that the same could be done at Uintah.[127] S.Doc.No.212, LD 68, *supra*, at 109-120.

Senator Rawlins' diminishment bill did not pass.[128] Other important language was, however, included in the Indian Appropriations Act of 1902:

> That the Secretary of the Interior, *with the consent thereto of the majority of the adult male Indians* of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a

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[126] Act of June 18, 1878, ch. 266, 20 Stat. 165, LD 9.

[127] Rep. Sutherland also drew as analogy the Uncompahgre Reservation. S.Doc.No.212, LD 68, at 116. The Utah delegation now tried to justify the opening of the Uintah Reservation by urging its similarity to the status of the Uncompahgre Reservation. Earlier, the opening of the Uncompahgre Reservation had been justified by the congressmen because its status was so different from the Uintah Reservation. See note 89 *supra*, and accompanying text.

[128] Had the Rawlins bill been enacted, the Uintah Reservation boundaries would clearly have been diminished. Compare *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *Russ v. Wilkins*, 624 F.2d 914 (9th Cir. 1980).

> family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date *all the unallotted lands within said reservation shall be restored to the public domain: Provided,* That persons entering any of the said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre; *And provided further,* That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; . . .

Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264, I Kapp. 750, 753 (2d ed. 1904), LD 82 (emphasis added). The Act further provided that the mineral lessees and permitees in lieu of their leases could locate up to 640 acres of contiguous mineral lands upon the area to be restored to the public domain, with one exception: "the Raven Mining Company, which may in lieu of its lease locate *one hundred mining claims* of the character of mineral mentioned in its lease. . ." *Id.*, 32 Stat., at 264 (emphasis added). Proceeds from the entry of the restored lands were to be used first to pay the expenses incurred under the Act; the remainder to be used for the benefit of the Utes. *Id.* The Act additionally provided for payment of $60,064.48 to the Uintah and White River Utes "on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians,"[129] and $10,000 for claims arising from the 1888 cession, discussed *supra.* Payment

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[129] This was the amount paid to the United States from the Uncompahgre funds pursuant to the 1880 Agreement's and 1897 Act's requirement that they pay $1.25 an acre for their allotments. *Id.* 32 Stat. at 264; S.Rep.No.951, 57th Cong., 1st Sess., LD 69, at 3 (1902).

of the money was to be made "whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands. . ." *Id.*

Though the legislative history of the 1902 Act is comparatively sparse, see 35 Cong. Rec. 3650-3651, 3711 (1902), LD 70; S.Rep.No.951, LD 69, *supra,* at 3,[130] it seems clear that Congress did not accept Rep. Sutherland's view that the reservation should be opened unilaterally; Indian consent conditioned all operative clauses of the Act. See *Deseret Evening News,* June 9, 1902, JX 148 at 1 (comments of Sen. Rawlins).[130A]

President Theodore Roosevelt signed the 1902 Act into law on May 28, 1902, 35 Cong.Rec. 6069 (1902), but not without serious concerns. The President objected in particular to the favored treatment that the Act afforded the mining lessees.[131] He signed the bill upon assurances by influential congressmen that the Act would be amended

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[130] See also *Deseret Evening News,* Mar. 29, 1902, JX 131 at 1; *Id.,* Apr. 2, 1902, JX 132, at 5; *Salt Lake Herald,* May 2, 1902, JX 134, at 1, 3; *id.,* May 2, 1902, JX 136, at 1; *id.,* May 8, 1902, JX 137, at 2.

[130A] The Tribe argues that the 1902 Act harmonizes with the provisions of the General Allotment Act of 1887, Act of Feb. 8, 1887, § 5, ch. 119, 24 Stat. 388, 389-390, I Kapp. 33 (2d ed. 1904), LD 13, whereas the Rawlins bill did not. Plaintiff's Post-Trial Brief at 67-68. This is correct. Cf. note 133, *infra.* From this, however, the Tribe infers that the intent of the 1902 Act necessarily intended to maintain the reservation's original boundaries. The Tribe carries the significance of the 1887 Act to the construction of the 1902 Act too far, as do the defendant counties. See pages 1150-1153 & notes 203-213, *infra.*

[131] See *Salt Lake Herald,* May 23, 1902, JX 140, at 2. The President also opposed making the payment to the Indians on their claims contingent upon Indian consent to allotment, and the small size of the proposed allotments. *Salt Lake Herald,* May 25, 1902, JX 142, at 1. An amendatory resolution was proposed in the Senate to meet the President's objections, *id.; Deseret Evening News,* May 23, 1902, JX 141, at 1; *Salt Lake Herald,* May 27, 1902, JX 143, at 1.

to correct the offensive passages.[132] Some amendments were made by Joint Resolution of June 19, 1902:

> *Resolved* . . . That the provisions of the Act [of 1902] . . . are hereby supplemented and modified as follows:
>
> * * * * * * *
>
> In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.
>
> All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.
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> * * * * * * *
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> The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which

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[132] 35 Cong.Rec. 6869 (June 16, 1902), LD 84 (remarks of Rep. Sherman); *Deseret Evening News*, June 16, 1902, JX 149, at 2. The mineral lease provisions were scandalized in the press. *E.g.*, *Deseret Evening News*, June 7, 1902, JX 147, at 1.

> is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotments in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

32 Stat. 744, I Kapp. 799-800 (2d ed. 1904).[133]

The funding needed to execute the amended 1902 Act was not immediately forthcoming. A year later, in the Indian Appropriations Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-998, III Kapp. 17-18 (1913), LD 91, Congress provided funds to do surveying and to carry out the 1902 Act. The 1903 Act further provided

> That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the Act of May twenty-seventh, nine-

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[133]The Joint Resolution also provided that:

> Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled, "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," [the General Allotment Act] and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

The significance of this statute in this case is discussed at 1152-1153, *infra*.

The provision, *supra*, dealing with establishment of a grazing reserve was repealed by the Act of Mar. 3, 1903, 32 Stat. 982, 997-998, III Kapp. 18 (1913), LD 91.

> teen hundred and two, and *if their consent,* as therein provided, *cannot be obtained* by June first, nineteen hundred and three, then *the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians* the quantity and character of land named and described in said Act. . .

32 Stat., at 997-998 (emphasis added).[134] The time for opening the unallotted lands was extended to October 1, 1904. *Id.*

By letter of April 29, 1903, JX 133, 160, the acting Commissioner of Indian Affairs delivered formal instructions for allotting the Uintah Reservation to U. S. Indian Inspector James McLaughlin. See Instructions to J. McLaughlin, Esq., JX 133, 159. McLaughlin was instructed to meet in council with the Ute bands "and endeavor to obtain their consent to the allotment of lands." *Id.*, at 5.[135]

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[134] The Act also limited the grazing lands provided for in the 1902 Joint Resolution to 250,000 acres, to be located south of the Strawberry River. *Id.*, 32 Stat. at 998. By an amendment offered by Senator Kearns of Utah, the Act opened mineral lands on the former Uncompahgre Reservation to entry. Senator Kearns commented,

> It has always been a pet scheme of mine to throw open these reservations, for I was convinced that the Indians were not making proper use of the land. And then again, I was opposed to such a large tract of land being practically unoccupied. You know a great deal of the best land in the state is embraced in these reservations, and we cannot well afford to keep out settlers.

Deseret Semi-Weekly News, Mar. 30, 1903, JX 157, at 1; see also, *id.*, Feb. 5, 1903, JX 156, at 5.

[135] Of course, Indian consent was no longer necessary under the 1903 Act. On January 5, 1903, the Supreme Court announced its decision in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). *Lone Wolf,* "the Indians' Dred Scott decision," *Sioux Nation of Indians v. United States,* 601 F.2d 1157, 1173 (Ct.Cl.1979) (J. Nichols, concurring), held that Congress could allot and open an Indian reservation without tribal consent. In the 1903 Act and subsequent legislation Congress relied on *Lone Wolf* to act unilaterally in dealing with re-

He met with the Uintah and White River Utes at the Uintah and Ouray Agency from May 18 through May 23, 1903. McLaughlin was in the peculiar position of one who was delegated to negotiate Indian consent to a chain of events that would occur regardless of the outcome of the negotiations. Accordingly, he argued to the Utes that they had no choice but to agree:

> INSPECTOR McLAUGHLIN: * * *
>
> My friends, you want to get rid of this idea that you have the say whether your reservation can be opened or not. You are simply to say whether or not you will accept allotments. The survey for your reservation is already advertised for. The work will commence in a few months. After the survey is completed, allotments will be made. . . . This is the condition, my friends, and it is your duty to accept it gracefully because the law of the great council [Congress] has said so. . . .

Minutes of councils with the Uintah and White River Ute Indians, JX 162, at 34 (1903).[136] The council reached

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servation lands. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 593 & n. 13, 595-599 & nn. 17, 19-20, 97 S.Ct. 1361, 1366 & n. 13, 1367-1369, 51 L.Ed.2d 660 (1977).

[136] Inspector McLaughlin's approach to the Utes was reminiscent of the Athenian's approach to the Melians recounted by Thucydides in his *History of the Peloponnesian War* (ca. 416 b.c.):

> *ATHENIANS:* Then we on our side will use no fine phrases saying, for example that we have a right to our empire because we defeated the Persians, . . . a great mass of words that nobody would believe. . . . Instead we recommend that you should try to get what it is possible for you to get, taking into consideration what we both really do think; since you know as well as we do that when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do

immediate impasse, the Indians wholly opposed to the allotment and opening of the reservation and McLaughlin adamantly refusing to discuss the question. The Indians responded to McLaughlin's stubbornness with reciprocal obstinance, even humor:

> QUINN: * * *
>
> Where did you find the key to this reservation to open it? That's the reason I don't understand even if you do say it is provided for. I don't believe it. You say you are here, and that you have this paper as your authority.
>
> If they find the key to this reservation, to open it we will give it to you. You come and throw it on the table and say, "Here, I have the key to this reservation. Throw it down here so I can see it. When you throw your key to the reservation out here, I will believe you.
>
> * * * * * * *
>
> INSPECTOR McLAUGHLIN: * * *
>
> I feel, my friends that I have done my duty in this matter. I have explained it so clearly that you cannot fail to understand it fully, but it is very difficult to convince persons who do not want to be convinced. . . .

Id., JX 162, at 66, 71.

Inspector McLaughlin reported to the Secretary of the Interior on May 30, 1903 that of 280 adult male Uintah and White River Utes, he was able to secure the signatures

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and the weak accept what they have to accept.

Thucydides, The Peloponnesian War, 401-402 (Penguin ed. 1954). As the City of Melos was beseiged and captured by the Athenians, so the Uintah Reservation was allotted and opened by the Government against its residents' wishes.

upon the assent to the allotment statute of only 82 of the Indians:

> I deemed it proper to transmit the same, but with the explanation that *the signers were as much opposed to the opening of the reservation* without consulting the Indians *as the non-signers were,* but they thus expressed their acceptance of the law to show their good will and readiness to comply with the wishes of the Government.

Letter from Insp. McLaughlin to the Secretary of the Interior of May 30, 1903, JX 165, at 5 (emphasis added), *reprinted in* H.Doc.No.33, 58th Cong., 1st Sess., LD 92, at 3-7 (1903). According to McLaughlin, the Indians were "unanimously opposed to the opening of their reservation under the provisions of the Act," *id.*, at 8.

> Those of the Indians who signed the acceptance of the Act, did so, as heretofore stated, to show their good will, and many others would doubtless have signed had there been anything to be gained by their doing so. They fully understood that they were to have land allotted to them whether they consented to the Act or not, and having nothing to lose by refusing to assent to the provisions of the Act they declined to sign and thus became a party to that which was distasteful to them. . . .

Id. JX 165, at 9.

Indian consent to the opening of the Uintah Reservation was wholly lacking in 1903, and never subsequently appeared. While several exhibits make reference to the "ceded" lands of the Uintah Reservation, these references are erroneous.[137] No cession of Uintah Reservation lands

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[137] *E. g.*, Act of Apr. 4, 1910, ch. 140, 36 Stat. 269, 285, LD 139 (refers only to 1902 Act); Act of Mar. 3, 1911, 36 Stat. 1058, 1074, LD 141; H.Rep.No.70, 77th Cong., 1st Sess., LD 179, at 3 (1941); 74

after 1888 was agreed to by even a simple majority of the Utes. Nor was cession language used in any of the relevant legislation affecting the Uintah Reservation. The absence of those "disestablishment factors"[138] distinguishes at least in part the circumstances found in *DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). Such an agreement of cession had been concluded by the Sioux and ratified by Congress in *DeCoteau* and had been agreed to by a majority of the Sioux and enacted in unilaterally amended form in *Rosebud;* both of those acts contained express language of cession. To the extent that Indian consent and express language of cession in *DeCoteau* and *Rosebud* aided the Court "in determining that congressional intent was to terminate the Reservation,"[139] that aid is wholly absent here.

The discussions in council did move Inspector McLaughlin to suggest amendments to the opening legislation to provide for creation of Indian timber and coal reserves for use by the Utes following allotment. See also Letter from Comm. of Ind. Aff. to the Secretary of the Interior of July 18, 1903, JX 167 (transmitting McLaughlin's recommendations); Letter from the Secretary of the Interior to the Comm. of Ind. Aff. of Aug. 25, 1903, JX 172 (recommendations should be transmitted to next session of Congress). On November 23, 1903, Interior submitted an amendment to the Indian Appropriations bill for 1904 em-

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Cong.Rec. 3408 (Jan. 28, 1931), LD 166 (remarks of Rep. Leavitt) (Reprinted document refers to nonexistent 1905 agreement. Cf. Rept. of the Comm. of Ind. Aff., 1906, JX 334, at 78); Letter from the Comm., Gen. Land Off. to the Comm. of Ind. Aff. of Sept. 28, 1922, JX 403 ("ceded Uintah lands").

[138] *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 599 n. 13, 97 S.Ct. 1361, 1369, 51 L.Ed.2d 660 (1977).

[139] *Id.,* at 598 n. 13.

bodying McLaughlin's recommendations. S.Doc.No.159, 56th Cong., 3d Sess., LD 101, at 3 (1905).

Though the timber and coal reserves proposal did not pass, Interior succeeded in securing congressional approval of an additional extension of the time for opening the reservation to March 3, 1905. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-208, III Kapp. 35, 53 (1913), LD 94. In July the Secretary authorized the Uintah agent to proceed with allotting lands at Uintah to the Uncompahgres, and in November, expanded that authority to include allotments for the Uintah and White River Utes. S.Doc.No.159, LD 101, *supra,* at 3.[140] Problems confronting the agent and the Office of Indian Affairs ranged from surveying matters,[141] to problems with mines and pro-

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[140] See Letter from Acting Comm. of Ind. Aff. to Rep. Murdock of July 26, 1904, JX 189; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Aug. 27, 1904, JX 193; Letter from Acting Agent Hall to Comm. of Ind. Aff. of Oct. 17, 1904, JX 199. The agent soon requested additional time, pointing out that the opening date of Mar. 10, 1905 required allotment to be completed in "the most extreme" weather. Letter from Acting Agent Hall to Comm. of Ind. Aff. of Dec. 14, 1904, JX 207. By letter of the same date, Hall requested that tracts of land be set aside for timber, coal, school grounds and other agency purposes. *Id.*, JX 208. Ten days later the Acting Commissioner informed Hall that a proposal for an extension until Oct. 1, 1905 had been submitted to Congress. Letter of Dec. 24, 1904, JX 209.

[141] Letter from U.S. Surveyor-General for Utah to the Comm., Gen. Land Office of July 28, 1903, JX 169; Letter from Acting Comm., Gen. Land Office to Comm. of Ind. Aff. of Aug. 4, 1903, JX 171; Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior of Apr. 30, 1904, JX 181; Letter from the Acting Director, U.S.G.S. to the Secretary of the Interior of May 9, 1904, JX 182; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Aug. 15, 1904, JX 191; *id.*, Aug. 27, 1904, JX 194; Rept. of the Comm., Gen. Land Office, 1904, JX 196, at 1374. Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 31, 1905, JX 243; S.Doc.No.159, 58th Cong., 3d Sess., LD 101 (1905).

spectors,[142] selection of the Indian grazing reserve[143] and protection of water rights for the Indian allottees.[144] Federal troops were requested to aid Acting Agent Hall in

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[142] See Letter from Acting Comm. of Ind. Aff. to Messrs. Chrystie, Brightman & Douglass of July 28, 1904, JX 190; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Oct. 19, 1904, JX 202; Letter from Secretary of the Interior to Raven Mining Co. of Dec. 14,1904, JX 206; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 15, 1905, JX 233.

[143] See Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Oct. 17, 1904, JX 201; Letter from the Secretary of the Interior to the Comm. of Ind. Aff. of Dec. 13, 1904, JX 205; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of May 13, 1905, JX 264; see also Petition to the Secretary of the Interior of Oct. 22, 1904, JX 203 (lands south of Strawberry River are rich in minerals; should not be reserved for Indian grazing).

[144] Between 1899 and 1902, Cyrus Cates Babb was assigned to make a hydrological survey of the Uintah Reservation for the U.S. Geological Survey. In his report, Babb recommended that steps be taken to protect the Indians' rights to the water, a supply which would fall short of the demand if the reservation was opened. H.Doc.No.671, 57th Cong., 1st Sess., LD 86 (1902). Babb recommended that an Indian irrigation system be implemented quickly. *Id.* Water rights protection became a significant concern in the administration of the reservation. See Letter from the Director, U.S.G.S. to the Secretary of the Interior of May 15, 1903, JX 161; Letter from the Acting Secretary of the Interior to the Comm. of Ind. Aff. of May 21, 1903, JX 163 (no rights for taking water off of reservation should be granted); Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of July 27, 1903, JX 168; Letter from Director, U.S.G.S. to the Secretary of the Interior of May 9, 1904, JX 182; Letter from the Acting Comm., Gen. Land Off. to the Comm. of Ind. Aff. of June 6, 1904, JX 183; *id.*, June 27, 1904, JX 184; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Oct. 17, 1904, JX 200; *id.*, Jan. 23, 1905, JX 217; *id.*, Mar. 29, 1905, JX 241; *id.*, April 7, 1905, JX 246; *id.*, Apr. 11, 1905, JX 248; Letter from Citizens' Committee to the Secretary of the Interior of Mar. 30, 1905, JX 242; Letter from Sen. Smoot to the Secretary of the Interior of Apr. 18, 1905, JX 251; Letter from Ass't. Atty. Gen. to the Secretary of the Interior of May 11, 1905, JX 262; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of May 11, 1905, JX 263; Letter from the Secretary of the Interior to the Comm. of Ind. Aff.

patrolling the Uintah Reservation and expelling "sooners," prospectors and other unauthorized tresspassers. Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of March 1, 1905, JX 226; *e. g.*, Letter from Secretary of Interior to the Comm. of Ind. Aff. of June 6, 1905, JX 272. While authority was granted to the Uintah Railway Co. to enter the reservation to survey a right-of-way to be secured under the Act of Mar. 2, 1899,[145] entry by other non-Indians was generally prohibited. The agent restricted travel upon roads passing through the reservation, with the approval of the Commissioner of Indian Affairs.[146]

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of May 16, 1905, JX 268; Letter to Acting Agent Hall from Comm. of Ind. Aff. of May 17, 1905, JX 269. The agency officials were particularly concerned with the impact of state water law on Ute water rights. See Letter from Agency Engineer to the Secretary of the Interior of Apr. 24, 1905, JX 252; *id.*, May 4, 1905, JX 259; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Apr. 27, 1905, JX 254; Letter from the Director, U.S.G.S. to the Secretary of the Interior of May 2, 1905, JX 258; Letter from State Engineer to Agency Engineer of May 15, 1905, JX 266; Letter from Agency Engineer to State Engineer of May 23, 1905, JX 270; Letter to Agency Engineer from State Engineer of June 8, 1905, JX 273; Letter from Agency Engineer to the Secretary of the Interior of June 15, 1905, JX 275; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Oct. 27, 1905, JX 325; *id.*, Nov. 17, 1905, JX 327; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Oct. 13, 1906, JX 335. In a letter from Acting Agent Hall to the Comm. of Ind. Aff. of July 5, 1905, JX 279, it was recommended that additional lands be reserved along the streams in order to control access to the streams by non-Indian users. Such lands were so reserved. Letter from Acting Comm. of Ind. Aff. to Acting Agent Hall of Aug. 5, 1905, JX 304; Presidential Proclamation of Aug. 3, 1905, 34 Stat., pt. 3, 3141, LD 112; *id.* of Aug. 14, 1905, 34 Stat., pt. 3, 3143 LD 114.

[145]Ch. 374, 30 Stat. 990, I Kapp. 102-104 (2d ed. 1904); Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 9, 1905, JX 231.

[146] See Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior of June 23, 1905, JX 277. The Secretary of the Interior himself disapproved a proposal for a new state road from Vernal to

Meanwhile, Congress was inquiring of the Secretary as to the progress being made towards opening. S.Res., 39 Cong.Rec. 1863 (Feb. 4, 1905). The Secretary submitted a report and documents indicating that more time was needed to complete the allotment process. S.Doc.No.159, 58th Cong., 2d Sess., LD 101 (1905). Senator Smoot further had introduced bills dealing with the opening of the Uintah Reservation. S. 6867 provided in part:

> That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied or entered by persons entitled to make entry thereof; . . .

S. 6867, 58th Cong., 3d Sess., LD 97, at 1-2. S. 6868 provided for reservation of Uintah timber lands for inclusion in the Uintah Forest Reserve. The described lands were to be "maintained as a national forest reservation," to be "subject to all the general laws, rules, and regulations now and hereafter in force for national forest reserves," and were to be "free from any claims of the Uintah and White River tribes of the Ute Indians except for rights and privileges specifically reserved to them in this Act; . . ." LD 98, at 6. The bill provided for creation of Indian timber and coal reserves within the Uintah Forest Reserve to be administered under forest reserve regulations. The third bill, S. 6869, LD 99, consented to suit

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Park City and Ogden, Utah on the ground that its construction "would be detrimental to the interests of the reservation, . . .". Letter from the Secretary of the Interior to the Comm. of Ind. Aff. of Mar. 18, 1905, JX 234; Application to the Secretary of the Interior, Nov. 21, 1904, JX 234; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Feb. 2, 1905, JX 234.

in the Court of Claims by the Utes on questions arising under the first two bills.

Though not enacted themselves, the provisions of S. 6867 and 6868 were substantially included in the Indian Appropriations Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105 (see Appendix A for text). In pertinent part of the 1905 Act provided:

> That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: *That the said unallotted lands,* excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, *shall be disposed of under the general provisions of the homestead and town-site laws* of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: . . . .
>
> That before the opening of the Uintah Indian Reservation the *President is hereby authorized to set*

> *apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary,* and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.

33 Stat., at 1069-1070 (emphasis added).

Additional provisions of the Act repealed the requirement that the Indian grazing lands be located south of the Strawberry River, protected the homestead rights of veterans, provided that unentered lands were subject to limited sale five years hence and readopted the 1902 Act's distribution of proceeds from entry into the lands. While preserving the mineral rights on the Uintah Reservation created by the 1902 Act's lease conversion provisions,[147]

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[147] Special provision was made for settling the mining claims of the major mineral operators on the Reservation, the Florence and Raven Mining Companies:

> That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two; and

the 1905 Act materially altered the operative statutory language governing the opening of the Uintah Reservation to non-Indian entry and settlement.

Without much question, opening of the Uintah Reservation under the original terms of the 1902 Act[148] would

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thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further*, That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: *And provided further*, That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right to ingress and egress to and from their respective properties over and through said reservation.

The press, particularly *The Denver Post*, had earlier styled the favored treatment of the mining companies as the foundation of "a gigantic land steal." *id.*, Jan. 16, 1905, JX 212. See also *Deseret Semi-Weekly News*, Jan. 19, 1905, JX 213, at 1; *id.*, Jan. 23, 1905, JX 215, at 5. Congress apparently was not dissuaded.

[148] The reference herein to the "1902 Act" includes the relevant portions of the Act of May 27, 1902, 32 Stat. 245, LD 82, as amended by the Joint Resolution of June 19, 1902, 32 Stat. 744, LD 85.

have accomplished the termination of the reservation; the unallotted lands were to be "restored to the public domain"—language precisely suited to disestablishment under *Seymour v. Superintendent,* 368 U.S. 351, 354-356, 82 S.Ct. 424, 426-427, 7 L.Ed.2d 346 (1962), and *Mattz v. Arnett,* 412 U.S. 481, 504 n. 22, 93 S.Ct. 2245, 2257, 37 L.Ed.2d 92 (1975). The impact of the 1902 Act on the Uintah Reservation's boundaries was clear at least in the mind of Rep. Sutherland of Utah:

> Mr. Chairman, at the last session of Congress [1902] we provided for opening the Uintah Indian Reservation. This bill makes an appropriation of a large part of the $175,000 mentioned in the preceding paragraph for this purpose. This is appropriated for making surveys for allotments and such other surveys as may be necessary to carry that out into operation. *If the Uintah reservation is opened, . . . this appropriation of $6,000 for reestablishing the boundary lines of the reservation is entirely useless.* The boundary lines have been in their present condition for many years, and if by any mischance the reservation should not be opened it will not hurt to let it wait for another year; and if the reservation is opened it is simply an appropriation of $6,000 without any useful purpose whatever. I think it should be stricken from this bill.
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> * * * * * *
>
> *The reservation will be simply restored to the public domain. . . .*

36 Cong.Rec. 1388 (Jan. 28, 1903), LD 90 (emphasis added).

The Tribe argues to the contrary, relying heavily upon the repeated references to the "opening" of the reservation as mitigating the plain meaning of the 1902 Act; a reservation that is "opened", so the argument goes, is not abolished, disestablished, diminished, or terminated. Plaintiff's Post-Trial Brief, at 65-80.

There is no question that the Uintah Reservation was "opened" to non-Indian entry and settlement. All of the reservations examined in *Rosebud, DeCoteau, Mattz, Seymour,* and *United States v. Celestine,* 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909), and in the numerous cases decided by the Courts of Appeals, were "opened" to non-Indian entry and settlement. Some of those reservations have been disestablished or diminished; others have not. The fact of opening merely leads to the next step in the inquiry. It is the substantive *manner* of opening that has been decisive in this line of cases and it is the *manner* of opening that is decisive here.

The manner of opening under the terms of the 1902 Act, restoration of unallotted lands to the public domain, by definition would have ended the reservation status of those lands. The 1903 and 1904 Acts speak of "opening" the Uintah Reservation under the 1902 Act rather than "terminating" it or "abolishing" it, but the operative 1902 public domain language remained in force. The Uintah Reservation, however, was not opened under the 1902 restoration language.[149] It was opened under the 1905 Act, which provides expressly that "the manner of opening such lands for settlement and entry, and for disposing of the same" shall be that the unallotted lands, excepting national forest[149A] and mineral lands, "shall be disposed of under the general provisions of the homestead and townsite laws of the United States"—not *all* the land laws of the United States, as at Uncompahgre in 1897: *only* the homestead and townsite laws.

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[149] As a practical matter, the effort to disestablish the Uintah Reservation under the 1902 Act failed of its purpose as similar legislative proposals abolishing the Klamath River Reservation had failed of enactment in *Mattz.* The 1905 Act herein reflects as much a retreat from the intent to terminate the affected reservation as the 1892 Act in *Mattz.*

[149A] As to the status of the national forest lands, see 1135-1141, *infra.*

In this respect the 1905 Act closely resembles the 1906 legislation that opened but did not disestablish the Colville Reservation in *Seymour,*[150] and the 1892 Act that opened but did not disestablish the Klamath River Reservation in *Mattz.*[151] In fact, the defendants cite no disestablishment case holding limited entry under the mineral, homestead and townsite laws to be statutory language "precisely suited to disestablishment" *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 597, 97 S.Ct. at 1368.[152] To the contrary, Indian reservations opened under such provisions have consistently been held to remain in existence. *United States v. Long Elk,* 565 F.2d 1032 (8th Cir. 1977) (surplus lands on Standing Rock Reservation disposed of "under the general provisions of the homestead and townsite laws of the United States," mineral lands to be reserved for late disposition. Act of Feb. 14, 1913, ch. 54, 37 Stat. 675, III

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[150] The Act of Mar. 22, 1906, § 3, ch. 1126, 34 Stat. 80 III Kapp. 163-165 (1913) provides that the unallotted lands of the Colville Reservation shall be classified by the Secretary as irrigable, grazing, timber, mineral, or arid lands and except for the mineral lands which are to be entered under the general mining laws, "such surplus lands shall be open to settlement and entry under the provisions of the homestead laws . . ." as well as to selection for townsite purposes under § 11 of the Act. *Seymour* found no intent to disestablish the opened reservation. 368 U.S. at 356, 82 S.Ct. at 427.

[151] The Act of June 17, 1892, ch. 120, 27 Stat. 52, I Kapp. 439 (2d ed. 1904), provides that the unallotted lands of the Klamath River Reservation are "declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands . . ." The provisions of the 1892 Act, the Court said in *Mattz,* "do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation." *Id.,* 412 U.S. at 497, 93 S.Ct. at 2254.

[152] While the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254 III Kapp. 71, 74 (1913), construed by the Supreme Court in *Rosebud,* used homestead and townsite language, the Court cited express language of cession also found in that act as the "language precisely suited to disestablishment." The Supreme Court has never treated such limited provisions, standing alone, as express language of termination.

Kapp. 555-558); *United States v. Dupris*, 612 F.2d 319 (8th Cir. 1979), *vacated as moot*, 446 U.S. 980, 100 S.Ct. 2959, 64 L.Ed.2d 836 (1980) (surplus land on the Cheyenne River Reservation disposed of "under the general provision of the homestead and town site laws of the United States," school sections and coal lands to be reserved. Act of May 29, 1908, ch. 218, 35 Stat. 460, III Kapp. 373-377 (1913)) *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1973) cited with approval in *Mattz, supra*, 412 U.S. 481, 505 n.23, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973) (same); *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972) (surplus lands of the Fort Berthold Reservation disposed of under "the provisions of the homestead, mineral and townsite laws of the United States," tribal forest lands and state school lands reserved. Act of June 1, 1910, §§ 8, 9, ch. 264, 36 Stat. 455, III Kapp. 462-466 (1913)).[153]

The Presidential Proclamation of July 14, 1905, 34 Stat. pt. 3, 3119, III Kapp. 605-608 (1913), LD 108,[154] opening

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[153] Interior Solicitor Mitchell Melich reached the same conclusion regarding Fort Berthold in a memorandum of March 13, 1970 which reversed an earlier Departmental position. M-36802 *in* 2 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 2009-2013 (1979).

At least one court has concluded that specification of the townsite laws in the opening legislative justifies an inference of continued reservation status:

> [I]f the opened land was still a part of the Reservation, the townsite laws would not be applicable, and an express statement by Congress was required to make them applicable. It may reasonably be inferred that in including this provision, Congress recognized that the townsite laws would not otherwise have been applicable.

Confederated Salish and Kootenai Tribes v. Namen, Civ. No. 2343 (D.Mont., dec. Sept. 20, 1979) at 21.

[154] See Appendix A, *infra*, for complete text.

the Uintah Reservation to non-Indian settlement parallels the terms of the 1905 Act:

> * * * I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that *all the unallotted lands in said reservation,* excepting such as have at that time been reserved for military, forestry and other purposes and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, *be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States;* . . .

Id., LD 108, 34 Stat., pt. 3, at 3120, III Kapp. at 606 (emphasis added).[155] Related proclamations issued in 1905 refer to provisions of the 1905 Act as authority, not the 1902 Act.[156]

Meanwhile, the Indian agency officials who formed an allotting commission had proceeded to complete the allotment distribution among the Uintah and White River Utes and other preparations for the opening pursuant to the

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[155] This proclamation was amended on August 2, 1905 to expand the number of applications drawn at random on the first two opening days. 34 Stat., pt. 3, 3140, III Kapp. 610 (1913) LD 111.

[156] Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602-605 (1913), LD 107 (Uintah forest reserve lands); *id.,* of Aug. 3, 1905, 34 Stat. pt. 3, 3141, III Kapp. 610-612 (1913), LD 112 (reservoir and agricultural lands); *id.,* of Aug. 14, 1905, 34 Stat. pt. 3, 3143, III Kapp. 612-613 (1913), LD 113 (additional townsites); *id.* of Aug. 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 613-614 (1913) LD 114 (reservoir lands). See Appendix A, *infra,* for the text of the proclamations.

1905 Act and the proclamations issued under it.[157] A schedule of allotments was submitted by the Commission to the Commissioner of Indian Affairs on June 23, 1905. Letter from Ute Allot. Comm. to Comm. of Ind. Aff. of June 23, 1905, JX 278. The schedule was duly approved by the Secretary of the Interior on July 18, 1905. Letter from the Acting Secretary of the Interior to the Comm. of Ind. Aff. of July 18, 1905, JX 292. The reservation was to be opened pursuant to the "Rosebud Regulations," a random selection, controlled entry procedure applied the year before in the opening of the Rosebud Reservation in South

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[157] The commission consisted of Acting Agent Hall, Agency Engineer W. H. Code, and Mr. Chas. Carter, a prominent local citizen. Rept. of the Comm. of Ind. Aff., 1905, JX 323, at 146. Some problems facing the commission were reported by the Chief Engineer for the Agency, W. H. Code:

> In company with Captain Hall I have spent a considerable time in examining the desirable lands of the reservation, and find the situation somewhat disappointing, as will many prospective settlers who now regard this as a land of milk and honey. The very best tracts of irrigable lands are located on the tops of high plateaus from two to four hundred feet higher than the adjoining river valleys. Water could only be placed on these plateaus at great expense, owing to the many miles of steep sidehill work, flumes, tunnels, etc., which it would be necessary to construct before water could reach the desired areas. The river valleys and lower benches near the streams upon which the Indians desire to be located, are interspersed with areas and ridges of rocky soil which would discourage any New England farmer. Much of the bench land joining the Uintah River on the west is practically a huge bed of boulders mixed with a small percentage of sand and clay and covered with a few inches of loam. On the valley lands immediately joining the streams, alkali is found in patches, and, in fact, the latter appears soon after irrigation begins even on the higher benches. Of course there are many tracts of very fair land, but it will not be easy to make the selections of good land in the limited time at our command.

Letter from Agency Engineer to the Secretary of the Interior of May 4, 1905, JX 259.

Dakota.[158] See *Deseret Evening News,* July 8, 1905, JX 282, at p. 5; *Deseret Semi-Weekly News,* Mar. 20, 1905, JX 236 at 2; 39 Cong.Rec. 1183-1184 (Jan. 21, 1905), LD 103 (remarks of Rep. Sherman); note 169, *infra.*

While the press was reporting that the Indians were content with the ongoing process of allotment and opening of the Uintah Reservation, *e.g., Deseret Semi-Weekly News,* Apr. 13, 1905, JX 250. at 5, all was not well. A Ute delegation had traveled to Washington in March, communicating their strong opposition to the forthcoming events. See *Deseret Evening News,* Mar. 18, 1905, JX 235, at 2; *id.,* Mar. 22, 1905, JX 237, at 2. As spring turned to summer, rumors of a possible armed uprising by the Utes circulated and were investigated and disproved by federal officials.[159]

By a series of proclamations issued by President Roosevelt, Uintah Reservation lands were withdrawn for in-

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[158] Counsel for the defendant counties asserts that use of the Rosebud Regulations is "particularly significant" to the boundary issue considered here. Counties' Post-Trial Brief at 46 n. 56. That *procedurally* the government provided for opening the reservation to less than a wholesale land rush indicates little about the *substantive* operation of the 1905 Act. See pages 1127-1133, *infra.*

[159] See Letters from Acting Comm. of Ind. Aff. to the Secretary of the Interior of May 5, 1905, etc., JX 260 (6 documents). An agent of the American Asphaltum & Rubber Co. reported that the White River Utes were "purchasing astonishing quantities of rifles and ammunition" and also "indulging in war dances," with the intent "to clean out all the white men in sight." *Id.,* JX 260, at 1. Lt. Col. F. West, Inspector General for the Army's Southwestern Division, reported that though the White River Utes were talking of moving back to Colorado, the merchants in Vernal and elsewhere "claim that the sales to the Indians [of weapons] are not as large this year as they were last year." There would be no "uprising." *Id.,* JX 260. See also Letter from Acting Agent Hall to the Comm. of Ind. Aff. of May 13, 1905, JX 265 (agent taking precautions to avoid incidents upon opening).

corporation in the Uintah Forest Reserve,[160] set aside for reservoir purposes[161] and designated as townsites.[162] Interior officials additionally designated reservation lands for various purposes relating to the Indians, exempting those lands from homestead entry.[163] Of the reservation area of over two million acres, 1,010,000 acres were added to the Uintah Forest Reserve, 2,100 acres designated in townsites, 60,160 acres set aside for reclamation and reservoir purposes, 2,140 acres entered as mining claims, and 1,004,285 were opened to homestead entry. 282,460 acres were reserved for various purposes as "unallotted tribal lands." Rept. of the Comm. of Ind. Aff., 1905, JX 323, at 501.

Even with the restraints applied under the Rosebud Regulations, the opening of the reservation on August 28, 1905 triggered its own land rush. Hundreds of people made homestead entries on the Uintah lands, far more than could be provided with good lands. Much of the intended farmland was at best marginal, as barren as Brigham Young's survey team had found it in 1860.

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[160] Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602-605, LD 107.

[161] Presidential Proclamation of Aug. 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 613-614, LD 114, *modifying id.* of Aug. 3, 1905, 34 Stat., pt. 3, 3141, III Kapp. 610-612, LD 112.

[162] Presidential Proclamation of July 31, 1905, 34 Stat., pt. 3, 3139, III Kapp. 609, LD 110, *id.* of Aug. 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 612-613, LD 113.

[163] See Rept. of the Comm. of Ind. Aff., 1905, JX 328, at 1893:

> The [Indian] grazing land, approximating but not exceeding 250,000 acres, for the most part lies along the boundary of the forest reserve in townships 1 and 2 north, ranges 1 to 9 inclusive, west, and also along the White Rock River. Small tracts have been reserved for timber, coal, burial grounds, school sites, and similar purposes necessary in aid of the civilization and uplifting of these people.

> The new settlers were almost immediately in trouble. By 1912 enough of them were so poverty stricken they went to Senator Reed Smoot asking for an act of Congress to place a moratorium on land payment.

O'Neil, The Reluctant Suzerainty: "The Uintah and Ouray Reservation," 39 *Utah Historical Quarterly* 129, 140 (Spring 1971), JX 478. A number of Utes felt wholly alienated by the situation. Over 400 Utes, mainly White Rivers led by Red Cap, left the Uintah Reservation in 1906 on an exodus to the Sioux Reservations of the Dakotas, hoping to enter into an alliance with the Indians there. No such alliance came to be. "After two years of dislocation, and poverty, the wandering Utes returned to Utah no better off than when they left. The only reason they refrained from fighting was the lack of any hope of success." *Id.*, JX 478, at 141 (footnote omitted). The "Absentee Utes" returned to the Uintah Reservation in 1908. See O'Neil, "An Anguished Odyssey: The Flight of the Utes, 1906-08," 36 *Utah Historical Quarterly* 315 (Fall 1968), JX 472; Rept. of the Comm. of Ind. Aff., 1906, JX 334 at 78-79; *id.*, 1907, JX 337, at 121-127; *id.*, 1908, JX 342 at 120-123.

In his annual report for 1905, the Commissioner of Indian Affairs observed:

> The future of these Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate. The circumstances are such that delay or hesitation will be fatal because all rights to waters in Utah are based on the priority of use. It is believed that an appropriation of not less than $500,000 for irrigation for the Utes should be asked for at the next session of Congress. . . .

JX 328, at 1893.

Irrigation and water rights protection was a matter of constant concern to the Uintah and Ouray Agency.[164] The Commissioner's recommendation was realized in 1906 through the creation of the Uintah Irrigation Project. See Act of June 21, 1906, ch. 3504, 34 Stat. 325, 375-376, LD 127.[165]

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[164] See *e. g.*, Letter from the Acting Comm. of Ind. Aff. of Oct. 13, 1906, JX 335; Letter from Acting Comm. of Ind. Aff. to Supt. of Irrig., Uintah & Ouray Agency of Sept. 26, 1907, JX 336; Letter from Ass't. Secretary of the Interior to Comm. of Ind. Aff. of Nov. 8, 1907, JX 338; Letter from Chief Clerk, Off. of Ind. Aff. to Supt. of Irrig., Uintah & Ouray Agency of Nov. 11, 1907, JX 339; Letter from the Comm. of Ind. Aff. to the Secretary of the Treasury of Dec. 19, 1908, JX 341; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Feb. 3, 1911, JX 345; Letter from Ass't. Comm. to Engineer, Uintah Irrig. Proj. of June 7, 1913, JX 361; Rept. of the Secretary of the Interior, 1915, JX 369, at 54-55; Letter from the Ass't. Atty. Gen. to the Secretary of the Interior of Apr. 26, 1916, JX 377.

In July, 1916, the United States Attorney filed *United States v. Dry Gulch Irrigation Co.*, No. 4418 in this Court to enjoin interference by white homesteaders with the federal canals and rights-of-way in the Uintah Irrigation Project. Complaint, No. 4418, JX 379. See Rept. of the Comm. of Ind. Aff., 1916, JX 381, at 46; Letter from Ass't. Secretary to supt. of Irrig. of Feb. 23, 1917, JX 383; Rept. of the Comm. of Ind. Aff., 1917, JX 387, at 36 (U.S. Dist. Ct. issued restraining order, appt'd. commissioner); see also, H.Doc.No.1250, 63d Cong., 3d Sess., LD 149 (1914); O'Neil & Mackay, "A History of Uintah-Ouray Ute Lands," JX 483, at 34-35 (1977).

[165] O'Neil & Mackay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 34 (1977):

> The project eventually covered 80,000 acres, most of the allotted lands, and contained 22 canal systems which diverted water from most of the streams in the Uintah Basin. A program was initiated to level, clear, plow, and fence the Indian allotments to get them into cultivation. Tribal funds were used for this purpose. By 1908 over $330,000 had been spent on the irrigation project; less than $7,000 had been paid to Indian laborers. Under the Act of April 30, 1908, authority was granted the Secretary of the Interior to lease any irrigable allotment with the consent of the allottee. At the same time the Ute people were permitted to sell allotments

Under one of the Presidential Proclamations issued under the 1905 Act, approximately 56,000 acres in the Strawberry Valley had been reserved for use in Indian irrigation projects.[166] However, the land was already under study by the U. S. Reclamation Service for a major reservoir project, a project the plans for which were approved by the Secretary of the Interior in 1905. The Reclamation Service offered to purchase the reserved Ute lands at $1.25 per acre. The offer was refused. Ann. Rept. of the U. S. Reclamation Service, 1909-10, at 268-269. In 1910, Congress appropriated the lands by statute:

> [T]he Secretary of the Interior is hereby authorized to pay from the reclamation fund for the benefit of the Uintah Indians the sum of one dollar and twenty-five cents per acre for the lands in the former Uintah Indian Reservation, in the State of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nineteen hundred and five, . . . *All right, title and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project* whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act.

Act of Apr. 4, 1910, ch. 140, 36 Stat. 269, 285, III Kapp. 429, 445, LD 139 (emphasis added). See also S.Rep.No.214, 61st Cong., 2d Sess., LD 138 (1910). By 1910, the statutory framework governing the opening of the Uintah Reservation had been established. What was the legal impact of these statutes upon the territorial boundaries of the Uintah Reservation?

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as soon as they were ready for farming. Out of 80,000 acres within the irrigation project, about 25,000 acres were sold to non-Utes.

[166] Proclamation of Aug. 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 613-614, LD 114.

As discussed above, nothing in the operative language of the Act of March 3, 1905, 33 Stat. 1048, 1069, LD 105, expressly terminated the reservation status of the unallotted Uintah lands not withdrawn for forest reserve or reclamation purposes.[167] The applicable Presidential Proclamations track the language of the 1905 Act. No agreement for the cession of the unallotted lands was ever concluded, and the relevant statutes include no cession language. Cf. *Rosebud Sioux Tribe v. Kneip, supra.*

To find the disestablishment of the Uintah Indian Reservation that the defendants assert, the record herein must satisfy the requirement that "[a] congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history," *Rosebud, supra,* 430 U.S. at 586, 97 S.Ct. at 1362, *quoting Mattz, supra,* 412 U.S. at 505, 93 S.Ct. at 2258. Such intent was not expressed on the face of the 1905 Act; this Court will now look to the legislative history and circumstances surrounding the opening of the Uintah Reservation in search of congressional intent.

The legislative history of the Act of Mar. 3, 1905, 33 Stat. 1048, commences with the introduction of the Indian Appropriations bill for 1905-1906, H.R.17474, in the House. See H.Rep.No.3472, 58th Cong., 3d Sess. (1905). Language had been included in the bill to change the existing law on the opening of the Uintah Reservation:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah, as provided by the acts of May 27, 1902 and March 3, 1903, and April 21, 1904, be, and the same *is hereby, extended to October 1, 1905:* Provided, That so much of said land as will be under the provisions of said

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[167] The status of the national forest and Strawberry Reservoir lands is determined *infra,* at 1135-1142.

> acts *restored to the public domain shall be open to settlement and entry by proclamation of the President of the United States,* which proclamation shall prescribe the manner in which these lands may be settled upon, occupied and entered by persons intending to make entry thereon; . . .

39 Cong.Rec. 1180 (Jan. 21, 1905), LD 103 (emphasis added). Amendments were offered on the floor of the House to modify the proposed language. One offered by Representative Sherman and passed by the House added to the date extension the following language: "unless the President shall determine that the same may be opened at an earlier date." *Id.* Representative Howell of Utah offered substitute language which read in part as follows:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah having been fixed as the 10th day of March, 1905, it is hereby provided that so much of said lands as will be under the provisions of said acts *restored to the public domain shall be open to settlement and entry by proclamation of the President of the United States,* which proclamation shall prescribe the manner in which these lands may be settled upon, occupied and entered by persons intending to make entry thereon; . . . and further provided, *That for one year immediately following the restoration of said lands to the public domain said lands shall be subject to entry only under the homestead, townsite and mineral laws of the United States.*

39 Cong.Rec. 1180 (Jan. 21, 1905), LD 103, *supra* (emphasis added). While Rep. Howell objected to any further extension of time because it would involve "the loss of practically one year to the settlers and home makers," he advocated the change in the manner of disposing of the lands restored to the public domain:

> In this connection there is another matter of great importance and one which should receive the earnest attention of Congress. In the pending bill these lands, when restored to the public domain, are subject to entry under the general land laws of the United States, coupled with such rules and regulations as the President may prescribe. In my humble judgment there should be some provision such as is embodied in my amendment, limiting the lands in the reservation to entry under the homestead, townsite and mining laws alone for one year from the date of opening.
>
> With the full development of the resources of this portion of the State of Utah will come also a capacity for supporting a numerous and thrifty population. Congress should see to it that until such time as those lands easy of access, reclamation and irrigation are settled by actual home makers the provisions of the homestead law alone shall prevail. . . .

39 Cong.Rec. 1182 (Jan. 21, 1905), LD 103 (remarks of Rep. Howell). Rep. Sherman opposed the Howell substitute, defending the need for an extension for the date of opening.[168] The bill was amended to read "September 1" instead of "October 1," and the substitute was rejected. 39 Cong.Rec. 1185, LD 103, *supra*. Rep. Howell then reas-

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[168] During the debate, Rep. Howell inquired,

> Mr. HOWELL of Utah. I would like to ask the chairman of the Committee on Indian Affairs what the reasons are that occur to his mind that would injure the Indians to have these lands, for the first year, at least, preserved for actual homebuilders rather than to be entered under the present land laws and the timber and stone act, etc? I see no reason why it should injure the Indians.
>
> Mr. SHERMAN. I do not see any reason myself, so far as that is concerned. . . .

39 Cong.Rec. 1183, LD 103, *supra*.

serted the last clause of the substitute as a separate amendment:

> "And further provided, That for one year immediately following the restoration of said lands to the public domain, said and shall be subject to entry only under the homestead, townsite and mining laws of the United States."
>
> Mr. SHERMAN. We have already provided in this amendment that they shall be opened under the regulations prescribed by the President, under a proclamation in which he can cover everything.[169] I think we ought not to adopt that amendment.
>
> Mr. HOWELL of Utah. It seems to me that the amendment is of great importance for the reason that it limits the choicest lands on that reservation to entry and location by actual home seekers and home builders, and restricts those who might desire to acquire title to land there under any other of the land laws of the United States at least for one year after the opening of the reservation. . . .

39 Cong.Rec. 1186 (Jan. 21, 1905), LD 103 *supra*. The amendment was rejected.

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[169] The "regulations prescribed by the President" Rep. Sherman refers to were likely the Rosebud Regulations:

> Mr. SHERMAN. This amendment under consideration proposes to open them under a proclamation by the President, which shall lay down rules and regulations for their opening, the idea being to have such rules and regulations as were prescribed, for instance, in the Rosebud Reservation opening and have been used as the rules and regulations in the opening up of the Indian lands for the last two or three years, and which have proved to be not only beneficial to the Indians, but of advantage to the would-be settlers.

39 Cong.Rec. 1183 (Jan. 21, 1905) LD 103, *supra;* see also Letter from the Secretary of the Interior to the President of Nov. 25, 1904, *reprinted in* 39 Cong.Rec. 1184, LD 103, *supra* (remarks of Rep. Sherman).

Two weeks later, Senator Smoot of Utah introduced two bills, S. 6867 and S. 6868. S. 6867 provided:

> That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the manner of opening such lands for settlement and entry, and for disposing of the same shall be as follows: That *the said unallotted lands*, excepting such tracts as may have been set aside as national forest reserve, *shall be disposed of under the general provisions of the homestead and townsite laws of the United States*; and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; . . .

S. 6867, 58th Cong., 3d Sess., LD 97 at 1-2 (emphasis added). S. 6868 provided for the withdrawal of specifically described timber lands as an addition to the Uintah forest reserve. S. 6868, 58th Cong., 3d Sess., LD 98.

In hearings held a few days later by a subcommittee of the Senate Committee on Indian Affairs, the inclusion of S. 6867 in the Indian Appropriations bill for the next year was discussed by Chairman Stewart, Senators Kearns and Smoot of Utah, and Senator Teller of Colorado.

> The CHAIRMAN. Suppose we do not put anything in with regard to extending the time there and leave that for the conference; strike it all out.
>
> Senator SMOOT. Senator Kearns had the matter under consideration, and if he is satisfied with the bill I would like to have it go in.
>
> Senator KEARNS. I would prefer not to load up the bill. *I would like to cut out all the House amendments.* If Mr. Newell recommends the withdrawal of

the reservoir site I would consent to that, but I would like to see the reservation opened at the date set in the last act—in March. If that is impossible, then leave it to the President.

Senator SMOOT. That is what my bill says, to leave it to the President, *with this added, that there shall be no lands settled there except under the homestead and townsite entry.*

Senator TELLER. *I want that in, myself.*

Senator SMOOT. That is all there is to this bill.

Senator TELLER. I have a memorandum to put that in.

The CHAIRMAN. Then we can not settle it this morning. I think we will have to strike that out.

Senator TELLER. I think Senator Smoot and Senator Kearns and Mr. Pinchot can get up something.

Senator SMOOT. The only difference between Senator Kearns and me on this whole proposition is this, that this bill that I ask be inserted in the appropriation bill says it shall be left to the President to open it—that he shall issue a proclamation: *but it adds further, Mr. Chairman, that no land shall be located there except under the homestead and town-site laws.*

* * * * * *

Senator TELLER. *We want that provision in about the homestead or town-site entries. I am not going to agree to any entry of that land except under the homestead and town-site entries.*

Senator SMOOT. *That is exactly what my bill is,* and leaving the President to issue the proclamation.

Senator TELLER. *I am not going to consent to any speculators getting public land if I can held it.*

> Senator KEARNS. Will the committee go into the matter of reserving that forest reservation? Could we not safely leave that with the Department?
>
> Senator TELLER. I do not believe we ought to go into that, but, as this is an Indian reservation, we should authorize the President to reserve what he thinks is proper, or, more properly speaking, the Secretary of the Interior.

"Indian Appropriation Bill, 1906," Hearings, Subcomm. of the Sen. Comm. of Ind. Aff., 58th Cong., 3d Sess., LD 100, at 29-30 (1905)(emphasis added).

Following the hearings, the Secretary of the Interior reported to the Senate on the progress being made in preparing to open the Uintah Reservation, see S.Doc.No.159, 58th Cong., 3d Sess., LD 101 (1905), and the Committee on Indian Affairs reported out the Indian Appropriations bill. S.Rep. No.4240, 58th Cong., 3d Sess., LD 102 (1905).

The Committee had agreed to Commissioner Leupp's recommendation that the time for opening be extended to September 1, 1905, unless the President determines an earlier date to be appropriate. *Id.* at 14. In a letter reprinted by the Committee the Commissioner advised that

> As the manner of opening Indian reservations to entry and settlement after the lands are restored to the public domain is a matter that comes within the jurisdiction of the General Land Office, it is suggested that the bill be referred to that office.

Id., LD 102, at 14. The Commissioner's reading of the bill apparently saw the Senate provisions as supplementing the restoration to be accomplished under the 1902 Act, as did the Howell substitute that failed in the House, rather than as amending or repealing its opening provisions. The Commissioner of the General Land Office took a different view.

> Attention is called to the fact that under act of May 27, 1902 (32 Stat. 263), these lands were to be simply "restored to the public domain," and could, consequently, under that statute be appropriated under any of the public-land laws, while the pending bill provides that they "shall be disposed of under the general provisions of the homestead and town-site laws of the United States."
>
> Possibly doubt may arise in determining *whether the proposed bill will repeal the act of May 27, 1902*, in so far as that act would permit entries under other than the homestead and town-site laws, and for the purpose of removing any possible doubt on this subject I would suggest that the word "only" be inserted between the words "of" and "under" . . .

Id., LD 102, at 15 (emphasis added).[170] Though "only" was not added by the Committee to the Senate version, the subsequent legislative history of the 1905 Act tacitly acknowledges the observation by the Land Office Commissioner that the 1905 Act repealed the public domain language of the 1902 Act. References to the Uintah Reservation being restored to the public domain all but vanish

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[170] The Commissioner further commented that

> "The provisions of this bill prescribing the manner in which the lands are to be opened are similar to the provisions under which the Rosebud Indian Reservation, in South Dakota, and the Devil's Lake Indian Reservation, in North Dakota, were opened during the past year."

Id., LD 102. These comments should not be read too broadly. While it is true that both Rosebud and Devil's Lake were opened under the homestead and townsite laws, with school sections reserved to the states, both of those acts included express language *ceding* the unallotted lands. See Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254, III Kapp. 71-75 (Rosebud); Act of Apr. 27, 1904, ch. 1620, 33 Stat. 319, III Kapp. 83-87 (Devil's Lake). The 1905 Ute Act did not. The bill was indeed similar, but certainly was not the same.

from the legislative material. It was clear to Congress that the reservation was to be "opened" under the homestead and town-site laws.

The Indian Appropriations Bill, H.R. 17474, was without debate amended on the floor to substitute the modified versions of S. 6867 and S. 6868. 39 Cong.Rec. 3522 (Feb. 27, 1905), LD 103, *supra*.[171]

The House objected to the multiple amendments made by the Senate and the bill was referred to a conference committee. 39 Cong.Rec. 3751, LD 103, *supra*. Senators Stewart, McComber and DuBois and Representatives Sherman, Curtis and Stephens were appointed to the committee. 39 Cong.Rec., LD 103, at 3751, 3792. The conference report struck the House version, substituting the Senate language, 39 Cong.Rec., LD 103, at 3919, and this version was enacted as the Act of March 3, 1905, Stat. 1048, 1069, LD 105. The legislative history of the 1905 Act parallels that of the 1892 Act construed in *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). As in *Mattz*, a House effort that could have disestablished the Uintah Reservation failed to accomplish its objective, for the Senate bill's language was substituted for that of the House. The Senate version, like the Act in *Mattz*, allowed entry of the opened reservation only under the homestead and other specified laws. Compare *Mattz v. Arnett, supra*, 412 U.S. at 501-504, 93 S.Ct. at 2256-2257. Here, as the Supreme Court pointed out in *Mattz*, "Congress was fully aware of the means by which termination could be effected." *Id.*, at 504, 93 S.Ct. at 2257. But clear termination language was *not* employed in the 1905 Act. Indeed, it was purposefully rejected.

Senator Henry M. Teller, a primary advocate of the Senate language, had long opposed the allotment of Indian lands and wholesale opening of Indian reservations to white

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[171] The Senate versions are identical to this legislation as enacted.

settlement under the allotment bills, charging that such legislation was in the interests of non-Indian land speculators. See 11 Cong.Rec. 783 (Jan. 20, 1881) (remarks of Sen. Teller) *id.* at 780-781, 934-935; D. Otis, The Dawes Act and the Allotment of Indian Lands 12, 18, 44, 46, 50 (Prucha ed. 1973).[172] During the Senate debate on the Indian Appropriations bill in 1905, Senator Teller vehemently attacked the allotment program:

> Mr. TELLER. * * * I have the satisfaction, Mr. President, when I look over the present condition of Indian affairs in this country to remember that I have never voted for the allotment of an acre of Indian land; and I think upon all occasions, when reasonable opportunity presented itself, and sometimes when it was not reasonable, I have protested against such action. . . .

39 Cong.Rec. 3515 (Feb. 27, 1905), LD 103. The 1905 Act reflects more the conservative approach expressed by Senator Teller, who insisted on the homestead and townsite language in committee, than the wholesale opening advocated earlier by, for example, Rep. Sutherland of Utah. Cf. Sen.Doc.No. 212, 57th Cong., 1st Sess., LD 68, at 111-120 (1902) (remarks of Rep. Sutherland).[173]

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[172] Senator Teller, for example, commented on an earlier allotment bill:

> This is a bill that, in my judgment, ought to be entitled "A bill to despoil the Indians of their lands and to make them vagabonds on the face of the earth," because, in my view, that is the result of this kind of legislation. . . .

Id. 11 Cong.Rec. at 934.

[173] Commissioner of Indian Affairs Francis Leupp expressed a similarly critical viewpoint on the subject of "opening" legislation, particularly the opening of the Uintah Reservation:

> There are two general methods of making allotments. . . .
> The Uintah Reservation, in Utah, furnishes an example of the

Nothing in the legislative history of the 1905 Act approaches a clear expression of congressional intent to disestablish the Uintah Reservation, particularly under the Senate language. Cf. *Rosebud Sioux Tribe v. Kneip, supra.* The "public domain" language of the 1902 Act and the 1905 House proposals was deliberately rejected in favor of the more limited homestead and town site language.

The distinction between the 1905 Uintah legislation and contemporaneous legislation that expressly disestablished other reservations seems to be discerned in executive documents reporting on the opening of those reservations. For example, the Secretary of the Interior comments,

> The opening to settlement and entry under the homestead law of the Rosebud Indian *lands* in South Dakota and of the Devil's Lake *lands* in North Dakota, . . . , respectively, was successfully accomplished, and the entry of the lands in said reservations is still in progress. Equally successful was the opening to settlement and entry under the homestead laws on August 28, 1905, of the unreserved and unallotted land of the Uintah Indian *Reservation* in Utah under the act of March 3, 1905 (33 Stat.L., 1069).

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rushing and haphazard method. The allotments there had to be made very hastily, because the act directing the opening of the reservation did not allow a reasonable time. It was impossible to survey the lands before the opening, much less before the allotments were made, . . .

* * * * * *

Not uncommonly nowadays reservations are opened by special act of Congress, and in almost every instance, as I have pointed out elsewhere, the primary object seems to be to hasten the date when the surplus unallotted lands can be taken by the homeseeker. This is not unnatural, in view of all the circumstances, but it is unwise nevertheless. Too little thought is given to the condition of the Indians to be allotted, and, incidentally to this, not enough regard is paid to the ultimate welfare of the whites who will try to acquire homes on the coveted lands or of those who will ultimately succeed to a large part of the allotments. . . .

Report of the Secretary of the Interior, 1905, JX 328, at 1495 (emphasis added). Both the Rosebud and Devil's Lake "lands" were governed by express language of cession, while the opening at Uintah was of a "reservation." Similarly a report by the Assistant U.S. Attorney General for Public Lands draws a distinction between the opening of Rosebud and Devil's Lake and the opening of Uintah: while opened lands at Rosebud and Devil's Lake are said to be "restored to the public domain," Uintah lands are said "to be disposed of under the provisions of the Act of March 3, 1905 . . .," and to be "opened to homestead entry." See *id.*, JX 328, at 1501-1502.

Simple logic commands the conclusion that an opening of a reservation to entry under two specified statutes is, by definition, not a restoration to the status of "public lands" or public domain: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U.S. 761, 763, 23 L.Ed. 769 (1875).

The opening of the Uncompahgre Reservation to entry under all the land laws of the United States was tantamount to a restoration to public domain status; opening of the unallotted lands of Uintah Reservation under only two of those laws was not.[173A] Reservation lands remain such until expressly withdrawn from that status by Congress. *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909); *Rosebud Sioux Tribe v. Kneip, supra.*

The defendant State and counties assert that congressional intent to disestablish the unallotted Uintah lands is

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[173A] When Congress desire that other of the public land laws apply to the Uintah lands it expressly legislated to that effect. See *e. g.*, Act of Apr. 4, 1910, ch. 140, 36 Stat. 269, 285, III Kapp. 429, 445, LD 139 (Carey Act, 28 Stat. 442, as amended, 29 Stat. 434, extended to Uintah desert lands).

proven through reflection in subsequent references in legislative materials to the "former" Uintah Reservation, the "late" Uintah Reservation, etc. The briefs offer an impressive catalog of citations to past-tense references. See State of Utah Post-Trial Brief at 42-43; Defendant Counties' Post-Trial Brief at 100-101. A careful analysis of those items discloses a common source, a source not necessarily representative of past or present congressional intent. Senator (formerly Representative) George Sutherland introduced three bills between 1906 and 1910 dealing within the Uintah Reservation lands. Each of the bills includes a reference to the "former" Uintah Indian Reservation in the title. Congressional committee reports and references to the bills on the floor of either house track the language of the bill titles in making shorthand descriptons of the bills or their purposes. S. 3935, 59th Cong., 1st Sess., a bill "to authorize Indians on the former Uintah Reservation to cut and sell cedar and pine timber for posts and fuel," was reported in S.Rep.No.823, 59th Cong., 1st Sess., LD 122 (1906). The report itself includes references to the Uintah Reservation in the present tense ("Very little of this class of timber is to be found upon other parts of the reservation available to the settlers," "land of the Uintah Indian Reservation," "Indians of the Uintah Indian Reservation"). S. 6375, 59th Cong., 1st Sess., a bill "granting lands within the former Uintah Indian Reservation" to the Episcopal Church was reported from committee in S.Rep.No.4263, 59th Cong., 1st Sess., LD 126 (1906). References in the committee report to the "former" reservation are descriptions identifying the bill by tracking its operative language. The same is true of the House Committee report, see H.Rep.No.5010, 59th Cong., 1st Sess., LD 128 (1906) and of discussion of the bill on the Senate and House floor. See 40 Cong. Rec. 8306 (remarks of Sen. Sutherland), 9386 (remarks of Rep. Howell). The bill passed both houses without debate and was enacted in the form proposed by Sen. Sutherland. Act of June 29, 1906, ch.

3599, 34 Stat. 611, LD 129. S. 5926, 61st Cong., 2d Sess., a bill "to make available certain lands on the former Uintah Indian Reservation under the reclamation act," was reported from committee in S.Rep.No.219, 61st Cong., 2d Sess., LD 138 (1910). The past-tense references in the report merely recite the bill's language. They do not reflect an informal congressional evaluation of the effect of the 1905 Act. The language of the bill was carried on to the final version of the bill, which became law. Act of Apr. 4, 1910, ch. 140, 36 Stat. 269, 285, LD 139.

On the floor of the Senate on March 8, 1906 Senator Sutherland offered an amendment to the Indian appropriations bill for that year which dealt with canals and ditches on grazing lands upon the "former" Uintah Reservation. 40 Cong.Rec.3500 (Mar. 8, 1905), LD 123. The bulk of the past-tense legislative references, in fact, arise from the activities of Senator Sutherland. He and his relatively anti-Indian views had not yet joined the Senate in the session that enacted the 1905 langauge. What is most revealing, however, is the fact that following his departure from the Senate in 1917, references to the "former" Uintah Reservation fade from the legislative materials. Commencing with the Indian Appropriations Act of 1921, Act of Mar. 3, 1921, ch. 119, 41 Stat. 1225, IV Kapp. 282, 312, LD 157, reference is made to the "Uintah and Ouray Reservation," and made consistently in the present tense. See *e.g.*, Act of Mar. 4, 1929, ch. 705, 45 Stat. 1562, 1584, V Kapp. 92, 111, LD 164 (reference to "the State Experimental Farm, . . . within the Uintah and Ouray Indian Reservation."); Act of Apr. 22, 1932, ch. 125, 47 Stat. 91, 111, V Kapp. 257, 274, LD 170 (same); H.Rep.No.2399, 74th Cong., 2d Sess., LD 174 (1936) ("These lands join the Uintah and Ouray Reservation . . ."); Act of Aug. 9, 1937, ch. 570, 50 Stat. 564, 573, LD 177 ("Indians of the Uintah and Ouray Reservation"); H.Rep.No.370, 77th Cong., 1st Sess., LD 179, at 3 (1941) ("The Uintah and Ouray Indian Reservation . . ."); S.Rep.No.243, 77th Cong.,

1st Sess., LD 180 (1941) (same); H.Rep.No.143, 78th Cong., 1st Sess., LD 181 (1943) ("add certain public lands to the Uintah and Ouray Reservation"); S.Rep.No.1188, 78th Cong., 2d Sess., LD 182 (1944) (same); S.Rep.No.749, 80th Cong., 1st Sess., LD 184 (1947) ("the exterior boundary of the Uintah and Ouray Reservation"); 94 Cong.Rec. 84, 1943, 1960 (1948), LD 185 (same); H.Rep.No.1372, 80th Cong., 2d Sess., LD 186 (1948) (same); Act of Mar. 11, 1948, ch. 108, 62 Stat. 72, LD 187 (same); Act of Mar. 16, 1950, ch. 59, 64 Stat. 19, LD 188 ("Uintah and Ouray Reservation"); S.Rep.No.602, 82nd Cong., 1st Sess., LD 189 (1951) (same); Act of Aug. 21, 1951, P.L. 82-120, 65 Stat. 193, LD 190 (same); H.Rep.No.2503, 82d Cong., 2d Sess., LD 192 (1952) (same); S.Rep.No.1632, 83d Cong., 2d Sess., LD 193 (1954) (same); 100 *Cong.Rec.* 9720-9725, 13124 (1954), LD 194 (same); Act of Aug. 27, 1954, P.L. 83-671, 68 Stat. 868, LD 197 (same); S.Rep.No.841, 84th Cong., 1st Sess., LD 195 (1955) ("exterior boundaries of the Uintah and Ouray Reservation"); H.Rep.No.1479, 84th Cong., 1st Sess., LD 196 (1955) (same); Act of Sept. 18, 1970, P.L. 91-403, 84 Stat. 843, LD 209 ("Uintah and Ouray Reservation").

The legislative documents also disclose a few references to the Uintah Indian Reservation in the present tense. See *e.g.*, H.Doc.No.892, 62d Cong., 2d Sess., LD 146 (1912) ("Conditions on Uintah Indian Reservation, Utah");[174] 53 *Cong.Rec.* 7863 (May 12, 1916), LD 152 ("the opening to settlement of the Uintah Indian Reservation");[175] Act of

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[174] That report also includes references to "the former Uintah Indian Reservation" and an erroneous reference to Uintah Reservation lands having been "restored to the public domain." *Id.* at 2. That reference, repeated verbatim in H.Doc.No.1250, 63d Cong., 2d Sess., LD 149, at 2 (1914) comprises the only legislative reference to the Uintah lands having been so restored under the 1905 Act.

[175] A memorial from the Utah Legislature reprinted *id.*, refers to lands "formerly within the boundaries of the Uintah Reservation" but

Aug. 1, 1914, ch. 222, 38 Stat. 582, 604, LD 148 ("of the bridge at Myton, on the Uintah Indian Reservation, Utah"); 53 Cong.Rec. 7863 (May 12, 1916), LD 152 (remarks of Rep. Howell); S.Doc.No.414, 66th Cong., 3d Sess., LD 156 (1921) ("leasing of irrigable Indian land on the Uintah Reservation, Utah"); Act of Mar. 4, 1931, ch. 522, 46 Stat. 1552, 1567, LD 168 ("Irrigation system, Uintah Reservation, Utah"); Act of Feb. 2, 1932, ch. 12, 47 Stat. 15, 22, LD 169 (same); Act of June 19, 1934, ch. 648, 48 Stat. 1021, 1033, LD 173 (same); 74 Cong.Rec. 3406 (Jan. 28, 1931) LD 166 ("the opening of the Uintah Indian Reservation").

The proposals of Senator Sutherland were not the only source of past-tense references; three bills offered by Senator Smoot of Utah included past-tense descriptions as did the discussion surrounding them.[176] Debates on the bills prove palpably ambiguous; comments by Senator Smoot, Representative Howell, and others include present as well as past-tense references.[177] See 40 Cong.Rec. 1064, LD 116, (remarks of Sen. Smoot); *id.* at 1332 (remarks of Rep. Howell); S.Rep.No.139, 59th Cong., 1st Sess., LD 117 (1906); 40 Cong. Rec. 3553 (1906), LD 131 (remarks of Rep. Howell); S.Rep.No.893, 62d Cong., 2d Sess., LD 142

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is referring to the Indian grazing lands reserved under the 1905 Act—by definition, *Indian reservation lands.*

[176] See S. 321, 59th Cong., 1st Sess., ("lands which were heretofore a part of the Uintah Indian Reservation"); S.Rep.No.139, 59th Cong., 1st Sess., LD 117 (1906) (same); 40 *Cong.Rec.* 144, 1064, 1465 (1906), LD 116; S. 3016, 66th Cong., 2d Sess., ("Unsold lands formerly included in the Uintah Indian Reservation"); H.Rep.No.901, 66th Cong., 2d Sess., LD 154 (1920); Act of May 14, 1920, ch. 187, 41 Stat. 599, LD 155. S. 6934, 62d Cong., 2d Sess. (lands "formerly a part of the Uintah Indian Reservation"); S.Rep.No.893, 62d Cong., 2d Sess., LD 142 (1912); Act of July 20, 1912, ch. 244, 37 Stat. 196, LD 145.

[177] House Report No. 291, 59th Cong., 1st Sess., LD 119 (1906) includes both past and present-tense references to the Uintah Reservation alongside past-tense references to lands within the Rosebud and Devil's Lake reservations.

(1912); H.Rep.No.443, 62d Cong., 2d Sess., LD 143 (1912); 48 *Cong.Rec.* 9101-9102, 9107, (July 15, 1912) LD 144 (remarks of Rep. Howell, *e.g.*, "The Uintah Indian Reservation is an arid region. . . .") Other references in the legislative documents include both present and former designations. See *e.g.*, Act of Apr. 30, 1908, ch. 153, 35 Stat. 70, 95, LD 135; Act of Mar. 3, 1911, ch. 210, 36 Stat. 1058, 1071, LD 141 (both "ceded" and current references).

This history of past-tense and present-tense references highlights the importance of the oft-repeated warning by the Supreme Court that "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Philadelphia National Bank,* 374 U.S. 321, 348-349, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1963), *quoting United States v. Price,* 361 U.S. 304, 313, 80 S.Ct. 326, 331, 4 L.Ed.2d 334 (1960); see *United States v. Southwestern Cable Co.,* 392 U.S. 157, 170, 88 S.Ct. 1994, 2001, 20 L.Ed.2d 1001 (1968); *Rainwater v. United States,* 356 U.S. 590, 593, 78 S.Ct. 946, 949, 2 L.Ed.2d 996 (1958); *United States v. United Mine Workers,* 330 U.S. 258, 282, 67 S.Ct. 677, 690, 91 L.Ed. 884 (1947); cf. *United States v. E. I. duPont de Nemours & Co.,* 353 U.S. 586, 590, 77 S.Ct. 872, 875, 1 L.Ed.2d 1057 (1957). In *Mattz v. Arnett, supra,* the Supreme Court found similar past-tense references "to have been a natural, convenient, and shorthand way of identifying the land subject to allotment" under the applicable legislation. *Id.,* 412 U.S. 498, 93 S.Ct. at 2254. In *Seymour v. Superintendent, supra,* the Court regarded "former" references in some legislation against the backdrop of a record of more recent, present-tense references as evidencing "some congressional confusion." *Id.,* 368 U.S. at 356-357 & nn. 12, 13, 82 S.Ct. at 427. In *City of New Town v. United States,* 454 F.2d 121 (8th Cir. 1972), the United States Court of Appeals for the Eighth Circuit found "inconsist-

ent and confusing" present and past-tense references to the Fort Berthold Reservation to have little weight:

> By 1916, however, inconsistencies began to creep into the legislation and the reservation was sometimes referred to as the "former" Fort Berthold Reservation. However these later statutes are not always consistent, even within themselves. *Thus we can find no clear intent by Congress to diminish the Fort Berthold Reservation from these later statutes.*

Id., 454 F.2d at 125-126 (emphasis added & footnote omitted); see *id.*, at 126 & nn. 9, 10.

Likewise, this Court can discern no clear legislative intent to disestablish the unallotted lands of the Uintah Indian Reservation evidenced by past-tense, "former" references. Not only are the references grossly inconsistent when considered together, they arise from a specific source, the Utah delegation, ca. 1906, and they virtually cease after the retirement of Senator Sutherland from the Senate in 1917, and furthermore, are merely passing references in text, not deliberate expressions of informal conclusions about congressional intent in 1905. Compare *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 590-593, 77 S.Ct. 872, 875-877, 1 L.Ed.2d 1057 (1957). The citations here lack the consistency of the past-tense references to the "old" Uncompahgre Reservation that permeate the historical record. Nor do they have the clarity of remarks such as those made by Representative Bell of California in 1905 concerning the Round Valley Reservation:

> Mr. BELL of California. Mr. Chairman, I offer the following amendment.
>
> The CLERK read as follows:
>
> Add a new paragraph, after line 25, page 24, to read as follows:

> "For fencing division-line between *relinquished and diminished portions* of the Round Valley Indian Reservation, Cal., $2,500."
>
> Mr. SHERMAN. I desire to hear some explanation of the amendment of the gentleman from California.
>
> Mr. BELL of California. I intend to make an explanation. I would state, Mr. Chairman, that a few years ago, by act of Congress, *a portion of the Round Valley Indian Reservation was relinquished and was placed upon the market for sale.* Only a few of the lands were sold, and here recently—a few weeks ago—we passed an act through the House authorizing the Secretary of the Interior to resurvey and reappraise the relinquished portions and offer them for public sale. The proceeds of this sale are to go to the Indians of the Round Valley Indian Reservation, so that when we appropriate this money—$2,500—for the purpose of fencing the division line between the reservation as it now is and *the portion that has been relinquished, that will pass to private ownership,* this money will be returned to the Treasury from the sale of *these outside lands.*

39 Cong.Rec. 1149 (Jan. 20, 1905), LD 103 (emphasis added). The "relinquished" Round Valley lands were disestablished from that reservation, see *Russ v. Wilkins*, 624 F.2d 914, 921-926 (9th Cir. 1980); such language in reference to the "opened" Uintah Reservation lands is notably absent.

This Court has little trouble reconciling the continuing reservation status of opened lands on the "former" Uintah Reservation for another reason: by the Act of March 3, 1905, Congress expressly provided for the withdrawal of timber lands from the Uintah Reservation for inclusion in the Uintah Forest Reserve. 1,010,000 acres were set aside—nearly half of the reservation. *Rosebud Sioux Tribe v. Kneip* and the related case law is not enlightening on

the impact on Indian reservation boundaries of the withdrawal of lands for national forest purposes.[178] The express language, legislative history and surrounding circumstances of the Act of Mar. 3, 1905, 33 Stat. 1048, 1069, however, justify the conclusion of this Court that the Uintah Indian Reservation was diminished by the withdrawal of timber lands for national forest purposes.

The 1905 Act itself provides as follows:

> That before the opening of the Uintah Indian Reservation the President is hereby authorized *to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves,* . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary; . . .

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[178] Counsel for the defendants and for *amicus* Paradox Production Corp. make repeated reference to *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct.Cl.1975) *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976), and to *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct.Cl. 1 (1957) and *id.*, 152 F.Supp. 953 (Ct.Cl.1957), as being dispositive of the reservation status of the national forest lands. In its reply brief, the Tribe correctly points out that

> [T]his citation is totally irrelevant to the issues in this case, since even the extinguishment of statutorially recognized titles (which is of greater legal magnitude than aboriginal title), as by the granting of land to homesteaders, does not terminate Indian Reservation status.

Id., at 25. It is fundamental that extinguishment of Indian title to lands within a reservation by itself does not withdraw those lands from a reservation. See *Seymour v. Superintendent*, 368 U.S. 351, 357-358, 82 S.Ct. 424, 427-428, 7 L.Ed.2d 346 (1962); *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909); 18 U.S.C. § 1151(a) (1976); see also *Ellis v. Page*, 351 F.2d 250, 252 (10th Cir. 1965); *Hilderbrand v. United States*, 287 F.2d 886 (10th Cir. 1961), *affirming United States v. Hildebrand*, 190 F.Supp. 283, 286-287 (D.Kan.1960). Indian title is not at issue here; territorial boundaries are, and are determined by separate rules and principles.

33 Stat., LD 105, at 1070 (emphasis added). By proclamation[179] President Theodore Roosevelt withdrew 1,010,000 acres from the reservation for this purpose, pursuant to his authority under the 1905 Act and the more general Act of March 3, 1891, § 24, ch. 561, 26 Stat. 1095, 1103, LD 25. That section empowered the President to

> set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, *as public reservations*, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. [Emphasis added.]

The original Senate version of the 1905 Act's forest provisions, S. 6868,[180] proposed by Senator Smoot, had included additional language directing that the forest lands be set aside be "free from any claims of the Uintah and White River tribes of the Ute Indians except for rights and privileges specifically reserved to them in this Act; . . ." *Id.*, LD 98, at 6.[181] That language, which would have been conclusive of the diminishment issue, was deleted in committee, as was much of the lengthy proposal. It seems clear from the committee hearings that the Senators perceived an obvious conflict between the withdrawal of the timber lands as a national forest and their continued reservation for Indian purposes:

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[179] Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602-605, LD 107.

[180] 58th Cong., 3d Sess., LD 98.

[181] Section 8 of the bill provided for establishment of an Indian timber and coal reserve. Section 9 protected Indian grazing rights in the forest lands that overlapped into the designated Indian grazing reserve. Section 11 provided that proceeds from forest activities above actual expenses would be used for the Utes' benefit. The final version of the Act retained a modified clause governing the proceeds from timber sales. See 33 Stat., at 1070.

Senator TELLER. Why do we have to do anything about that forest reserve? Can not the President do it?

Senator SMOOT. This authorizes the President to do it.

Senator TELLER. Has he not the authority to do so?

Senator SMOOT. *It is Indian Land, and he can not do it.*

* * * * * *

The CHAIRMAN. *You could say in three lines that the President shall have the same right to declare a forest reserve there as he would have if there were no Indian reservation.*

* * * * * *

Senator DUBOIS. You can go into any forest reserve now and locate a mining claim.

Senator SMOOT. Yes, sir; anyone can.

The CHAIRMAN. Then it seems to me that if you will just authorize the President to make the reserve and leave it entirely to him, *notwithstanding it is an Indian reservation*, that would be sufficient.

Senator SMOOT. And say nothing as to the Indians' rights?

The CHAIRMAN. Nothing at all.

Senator TELLER. What have you said about the Indians' rights?

Senator SMOOT. As to the sale of timber; all sales of timber shall go to the credit of the Indians.

Senator TELLER. Do you want to sell any timber?

Senator SMOOT. Yes; * * *

Senator TELLER. Can you not do that now under the general law?

Mr. [Gifford] PINCHOT. No, sir.

Senator TELLER. You can on public lands.

Mr. PINCHOT. *The trouble is that these are treated as Indian land.*

Senator TELLER. Can you not say in this bill in a general way that the President shall set aside this land and let it go at that?

* * * * * * *

Senator DUBOIS. Do not put anything in that is covered by existing law. Do not re-enact, but simply say—

Senator TELLER. *That the present law shall apply to this case.* Then, if you have to put in something about payments to the Indians for timber, put that in.

"Indian Appropriations Bill, 1906," Hearings, Sub Comm. of the Sen. Comm. on Indian Affairs, 58th Cong., 3d Sess., LD 100, at 26, 28-29 (emphasis added). In earlier discussion on the House floor, Representative Howell of Utah had commented:

> The northern part of this reservation is of great altitude and is densely wooded; it is in this part that all water courses draining the reservation find their source. This particular portion will not be thrown open to entry, but is to be set aside as a forest reserve *and will later be incorporated with the present Uintah Forest Reserve.*

39 Cong.Rec. 1180 (Jan. 2, 1905), LD 103 (emphasis added). The Senate amendments, enacted as law, provided for that incorporation.

While it is true that Congress may disestablish or diminish an Indian reservation by restoring the lands to the public domain, it is also true that Congress may diminish an Indian reservation by withdrawing and reserving the lands for an inconsistent purpose. Cf. *United States v. Wounded Knee*, 596 F.2d 790, 792-796 (8th Cir. 1979). The status and purposes of national forest lands are distinct from the status and purposes of Indian reservations, or federal reservations for other purposes. The Act of March 3, 1891, *supra*, defines national forests as *public* reservations. National forests have from before 1905 until now been governed by laws, regulations and an administrative structure separate from those governing Indian affairs intended to serve specific, narrow purposes.[182] A month prior to the enactment of the 1905 Ute Act, Congress had substituted the Secretary of Agriculture for the Secretary of the Interior in the administration of the national forests, transferring those powers to a different Executive department. Act of Feb. 1, 1905, ch. 288, 33 Stat. 628. Clearly the lands included in the Uintah Forest Reserve would be administered wholly apart from the lands remaining a part of the Uintah Indian Reservation. The Act expressly provides that the Uintah forest lands would be "subject to the laws, rules, and regulations governing forest reserves," *not* the laws, rules and regulations governing "Indian country", or Indian reservations.

This dissonance between national forest and Indian reservation status is highlighted by subsequent actions taken by Congress in dealing with the Uintah lands. In 1915, a move arose to attach the Indian grazing lands reserved from entry at Uintah to the Ashley National Forest Reserve and place them thereby under the control of the Forest Service. See 53 Cong.Rec. 7863-7865, LD 152 (May

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[182] See *e. g., United States v. New Mexico*, 438 U.S. 696, 705-718, 98 S.Ct. 3012, 3016-3023, 57 L.Ed.2d 1052 (1978); 16 U.S.C. §§ 471 *et seq.*

12, 1916). Both the Indians and officials in the Interior Department opposed the plan. See Letter from Ute Indians to Agent Kneale of Jan. 10, 1916, JX 374 (Indian protests); Letter from Agency Supt. to the Comm. of Ind. Aff. of Jan. 31, 1916, JX 375; Letter from the Comm. of Ind. Aff. to Sen. Meyers, Chmn., Comm. on Publ. Lands, of Apr. 15, 1916, JX 376. In a letter to Rep. Howell dated February 28, 1916, Commissioner of Indian Affairs Cato Sells wrote:

> The proposed action would place the tribal grazing reserve entirely under the control and management of the Forest Service, whose primary concern is the conservation of the forests of the United States rather than the welfare of the Indians.
>
> * * * * * *
>
> Based on official reports, the land is apparently not such as would properly be included within a national forest reserve. The entire grazing reserve is absolutely essential for Indian stock and that of white lessees. This service, rather than the forest service, is responsible for the proper and efficient management of Indian affairs. The Indian Service is now engaged in an aggressive campaign to save the water rights on this reservation, the success of which, so necessary to the future industrial welfare and progress of the Indians, depends upon its undisputed control of all contributory factors, including the tribal grazing reserve.
>
> For these reasons, it is my opinion that the proposal necessarily involves such elements of danger to the welfare and program of the Indians, which must at all times be my primary concern, that I cannot consistently give it my approval.

reprinted in 53 Cong.Rec., 7864-7865, *supra,* LD 152. The effort subsequently failed, see O'Neil and MacKay, "A His-

tory of the Uintah-Ouray Ute Lands," JX 483, at 35 (1977), was revived briefly in the 1920's and failed again. See Letter from Senator William King to the Secretary of the Interior of July 18,1922, JX 402; Letter from Agency Supt. to the Comm. of Ind. Aff. of Jan. 23, 1924, JX 405; Letter from Wm. Wash to the Comm. of Ind. Aff. of Jan. 23, 1924, JX 406; Letter from the Comm. of Ind. Aff. to Wm. Wash of Feb. 9, 1924, JX 407; Letter from the Acting Comm., Gen. Land Off. to E. Moosman of July 27, 1927, JX 413; Letter from Chief Clerk to Agency Supt. of Aug. 4, 1927, JX 414.

Over the years, it became apparent that the Utes were not receiving the benefits of the proceeds of the activities (timber sales, etc.) in the national forest as provided for by the 1905 Act. When a bill, S. 615, 71st Congress, 2d Sess., in 1930, was introduced to consent to a suit for the proceeds by the Uintah, Uncompahgre and White River Utes in the United States Court of Claims, the Senate Committee on Indian Affairs reported out a substitute measure that provided for the direct payment of $1,262,500 in satisfaction of the Utes' claims. S.Rep. No.725, 71st Cong., 2d Sess., LD 165 (1930). The Committee also reported the recommendation of Secretary of the Interior Roy L. Wilbur, joined by a subcommittee, that the forest lands be returned to the Utes in lieu of monetary compensation.[183] House debates on the measure reflect the un-

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[183] In a letter to Indian Committee Chairman Frazier dated Apr. 10, 1930, Secretary Wilbur wrote:

> MY DEAR MR. CHAIRMAN: Further reference is made to your request for report on Senate bill 615, which would authorize the Uintah Uncompahgre and White River Bands of Ute Indians to bring suit in the Court of Claims. One of the principal claims to be filed under this bill would be for payment to the Indians for 1,010,000 acres of their reservation lands in Utah which were withdrawn from entry and sale and included within the Uintah National Forest.
>
> I have to inform you that the Director of the Bureau of the

derstanding of the members that the lands were held in a national forest reservation rather than an Indian reservation:

> Mr. LEAVITT. * * * There has been a proposal that *the national forest area be given back to the Indians and made an Indian forest* instead of the government paying for it.
>
> That is an entirely impractical proposition. *The area has been,* since the proclamation by President Roosevelt, *a national forest,* and there have grown up in connection with it certain uses on the part of the people living in that section. It would be entirely out of the question to uproot all of these conditions. The only thing to do is to pay the Indians as is proposed in this bill.
>
> * * * * * * *
>
> Those of us on the committee who come from the kind of country which is being considered here know that the return to the Indians of a national forest area, after *it has been a national forest since the administration of President Roosevelt,* would be an impractical proposition. . . .
>
> Mr. STAFFORD. Will the gentleman inform the House as to *whether there is any such character of reserve as an Indian forest reserve*—referred to by the Secretary?
>
> Mr. LEAVITT. Yes; one was established by the present Congress out in the Yakima country in the

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Budget reports that Senate bill 615 would not be in accord with the financial program of the President, *but that legislation which would restore these lands to Indian ownership and place them in an Indian forest reserve* would be in accord with his financial program.

Reprinted in S.Rep.No.725, LD 165, *supra,* at 3 (emphasis added).

State of Washington. The Yakima Indians own a considerable area of rough land, the greatest value of which is for forest and grazing purposes. I myself introduced a bill which had the approval of those Indians, of Representative SUMMERS of Washington, and of the department, to set that area aside as an Indian forest. From it the returns secured will go into the tribal fund, and with regard to grazing and other uses the Indians shall have preference.[184]

Mr. STAFFORD. That is the only instance in the government where we have established a distinct Indian forest reserve?

Mr. LEAVITT. That is true. . . .

* * * * * * *

Mr. GREENWOOD. And during that period that the government has held this [Uintah] land *as a forest reservation* has there been any valuable timber cut off the reserve by the government?

* * * * * * *

I can understand that an Indian forest reserve might be made where the value of the timber cut could accrue to the Indians, but if during these years the timber had been cut off by the government, then *to turn it back to an Indian reserve* would not be just.

Mr. LEAVITT. It has been handled according to proper forestry practice, and it probably has as much timber value now as it ever had. . . .

Mr. GREENWOOD. And the committee after hearing all of these facts, in view of the fact that the government held it for some 25 years, deem it better

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[184] A search of volumes III-V of Kappler's *Indian Affairs: Laws and Treaties* reveals no special legislative reference to a Yakima "Indian Forest Reserve." Such reserves, to say the least, appear to be rare.

> to go through with the original contract *than to turn it back to an Indian reservation.*
>
> Mr. LEAVITT. Oh, it is much better to pay for it.
>
> * * * * * *

74 Cong.Rec. 3409-3410 (Jan. 28, 1931), LD 166 (emphasis added). The payment option was favored, and enacted into law. See Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092, LD 167.[185] That the national forest lands are not a continuing part of the Uintah and Ouray Reservation is further confirmed by congressional action taken twenty-five years later. The 1931 Act had settled much of the Utes' claim arising from the taking of the national forest lands. A claim for more than 36,000 acres of coal lands included within the forest withdrawals remained uncompensated.[186] This time it seemed more expedient to return the subsurface mineral estate to the Utes than to incur the burden of an "expensive and detailed appraisal of mineral and oil and gas resources" in measuring damages. H.Rep.No. 2171, 84th Cong., 2d Sess., LD 200, at 3 (1956). The proposal was also favored from an administrative standpoint:

> The Department of Agriculture desires to retain the administration and control of the surface of the land in order to protect the national forest and the important watersheds. The bill would restore to the Indians the mineral and oil and gas resources and retain in the United States the ownership and control of the

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[185] Congress appropriated $1,217,221.25, which was deposited in the U.S. Treasury to the credit of the plaintiff Tribe. H.Rep.No. 2171, 84th Cong., 2d Sess., LD 200, at 3 (1956).

[186] By special jurisdictional act, Congress consented to suit by the Ute bands on their remaining claims in the Court of Claims. See Act of June 28, 1938, ch. 776, 52 Stat. 1209, V Kapp. 619-621. *Uintah and White River Band of Ute Indians v. United States,* 139 Ct.Cl. 1 (1957), concluded that litigation.

surface rights which would be administered under the supervision of the Secretary of Agriculture.

Id. The legislative materials refer to the 36,000 acres of national forest mineral lands as being "formerly a part of the Uintah Indian Reservation." *Id.*, at 2, 4, 6. At the same time, the House Committee makes reference to the "Uintah and Ouray Reservation" in the present tense. *Id.*, at 4, 7. The Senate Committee indicates that the "Uintah and Ouray Reservation" is the current designation for the "former" Uintah Indian Reservation, which was diminished by the 1,010,000 acres of national forest withdrawals. See S.Rep.No.2372, 84th Cong., 2d Sess., LD 201 (1956). The Act of July 14, 1956, Pub.L.84-717, 70 Stat. 546, restores the mineral estate beneath the 36,000 acres to tribal ownership and vests the resources in the United States "in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah"—with no reference to the "former" Uintah Reservation.

Besides the legislative materials, the administrative exhibits evidence the implicit understanding that the forest lands were withdrawn from the Uintah and Ouray Reservation.[187] Had they remained a part of the reservation would not the Interior Department rather than the Department of Agriculture have been charged with supervision of the timber lands? The trust responsibility of the

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[187] See, *e. g.*, 53 I.D. 128 (June 14, 1930) JX 421 (Uintah Indian Reservation was reduced by the withdrawal of the forest lands); Letter from Sp. Agent Early to Comm. of Ind. Aff. of June 1, 1912, JX 356; Letter from Asst. Comm. of Ind. Aff. to Forester, U.S. Forest Service of July 12, 1912, JX 357; Letter from the Asst. Secretary of Agriculture to the Secretary of the Interior of Dec. 19, 1963, JX 467; Letter from Area Director, Bureau of Ind. Aff. to Agency Supt. of Jan. 10, 1964, JX 467; Letter from Asst. Secretary of the Interior to the Secretary of Agriculture of June 24, 1964, JX 468; Memorandum, Solicitor to Comm. of Ind. Aff. of Nov. 18, 1964, JX 469; Letter from the Secretary of the Interior to the Secretary of Agriculture of Aug. 2, 1966, JX 471.

federal government for management of the Indian forest reserves is primarily administered through Interior and the Bureau of Indian Affairs.[187A] See 1 American Indian Policy Review Commission, Final Report 325-328 (comm. print 1977); F. Cohen, Handbook of Federal Indian Law 312-316 (1942); and *e. g.*, 25 U.S.C. § 466; cf. *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980). The Uintah forest lands included in the designated national forest reserves are not administered in that fashion,[188] a fact buttressing this Court's conclusion that the Uintah Indian Reservation was expressly diminished to the extent of the withdrawal of the national forest lands.[189] See Map, Appendix B, *infra*.

The withdrawal of the 56,000 acres of the Ute lands by Presidential proclamation for the purpose of the Strawberry Reservoir Project ultimately led to the disestablishment of such lands from the Uintah and Ouray Reservation. Under the terms of the 1905 Act and the proclamation,

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[187A] Of course, the actions of the U.S. Forest Service in its dealings with Indians are also subject to being "judged by the most exacting fiduciary standards," *Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480 (1942), of the federal trust responsibility to Indians. As the United States Court of Appeals for the Ninth Circuit observed in *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), "It is fairly clear that *any* federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes. *Seminole Nation v. United States*, 316 U.S. 286, 297 [, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480]. . ." *Id.*, at 711 (emphasis in original). Accord, *Eric v. Secretary of the U.S. Dep't. of HUD*, 464 F.Supp. 44 (D.Alas.1978); see also American Indian Religious Freedom Act, 42 U.S.C. § 1996; H.Rep.No.1308, 95th Cong., 2d Sess. (1978).

[188] See also 16 U.S.C. § 480 (1976) (jurisdiction over national forests).

[189] It comes as no surprise that a 2,000,000 acre reservation that has been reduced by half its area might have been referred to as the "former" Uintah Reservation. The consistent pattern of present-tense references to the Uintah and Ouray Reservation since 1921 justifies drawing an inference that the remaining lands retain their reservation status.

the setting aside of the Strawberry acreage was arguably for Indian purposes, consistent with continuing reservation status. However, by language in the Act of April 4, 1910, ch. 140, 36 Stat. 269, 285, III Kapp. 429, 445, LD 139, discussed *supra* at page 1127, Congress provided that "All right, title and interest of the Indians in the same lands are hereby extinguished, and *the title management and control thereof shall pass to the owners of the lands irrigated* from said project" as provided under the terms of the Reclamation Act. *Id.* (emphasis added). Though arguably the legislative history indicates that the reservoir lands remained a part of the Uintah Indian Reservation until operated upon by the 1910 legislation, see S.Rep.No.219, 61st Cong., 2d Sess., LD 138 (1910) (*e. g.*, "lands on the former Uintah Reservation"), the transfer of all management and control of the lands to private parties, compounded with the express extinguishment of the Indians' interest, is inconsistent with continuing Indian reservation status. But see *United States v. Wounded Knee*, 596 F.2d 790, 794-796 (8th Cir. 1980),[190] *cert. denied* 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 289.

With the diminishment of the Uintah Indian Reservation by the withdrawal of the national forest and reclamation lands, it is not surprising that the administrative materials include references to the "former" Uintah Indian Reservation as well as to the present-tense Uintah or Uintah and Ouray Reservation.[191] More significant, however, is

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[190] Cf. "Oil and Gas Leases on the Strawberry Valley Reclamation Project," M-36051 (Supp.) (Nov. 1, 1951), II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, at 1558-1559 (1979); "Reservation Boundaries—Regulation of Hunting and Fishing—Colville and Spokane Reservations," (June 3, 1974), *id.*, at 2062-2071; "Jurisdiction of Flathead Tribal Council to Regulate Hunting on . . . Reservoir Sites," M-34739 (Jan. 3, 1947), *id.*, at 1429-1431.

[191] *E. g.*, Letter from Comm. of Ind. Aff. to Secretary of the Interior of Feb. 9, 1915, JX 366 ("the former Uintah Indian reservation");

executive departmental action taken in regards to the Uintah lands because of their apparent reservation status. A number of administrative reports on reservation land management recognize the continuing reservation status of at least the trust lands, which of course the federal government was duty-bound as the Indians' trustee to manage to the benefit of the Indians. See e. g., Report on Grazing Lands on the Reservation, Nov., 1931, JX 424; Ann. Report of the Uintah and Ouray Agency, 1931, JX 425; *Id.*, 1932, JX 427. Indian Service forestry officials recommended in 1931 that the Office of Indian Affairs actively see to the management of the "ceded, unappropriated lands within the boundary of the former Uintah Reservation." Letter from J. P. Kinney to the Comm. of Ind. Aff. of Sept. 22, 1931, JX 423, at 2. When the Indian Office reassumed such a posture in 1937 white ranchers protested. See O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 35-36 (1977). In a court test of the asserted federal authority, the United States Court of Appeals for the Tenth Circuit held that the Utes retained a beneficial interest in the unallotted and unentered lands sufficient to justify the Indian Bureau's proprietary management of the lands, issuance of use permits, etc. *Hanson v. United States,* 153 F.2d 162, 163 (10th Cir. 1946); see *Ash Sheep Co. v. United States,* 252 U.S. 159, 166, 40 S.Ct. 241, 242, 64 L.Ed. 507 (1920).[192]

Report of the Secretary of the Interior, 1915, JX 369 at 54 ("the Uintah and Ouray Indian Reservation"); Letter from Supt. Wright to Regional Forester of Jan. 24, 1929, JX 444 ("the Uintah Reservation"); Letter from Asst. Comm. of Ind. Aff. to Dir., Div. of Grazing of Aug. 8, 1939, JX 447 ("the Uintah Reservation"); Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of June 19, 1941, JX 450 ("the Uintah and Ouray Reservation").

Like similar references discussed by the Court in *DeCoteau v. District County Court*, 420 U.S. at 442 n.27, 95 S.Ct. at 1091, "the authors of these documents appear to have put no particular significance on their choice of a label."

[192] It is worthwhile to note that the issues raised in the *Hanson*

At various times, pursuant mainly to the provisions of the Indian Reorganization Act of 1934, Act of June 18, 1934, ch. 576, 48 Stat. 984, V Kapp. 378, 25 U.S.C. §§ 461 *et seq.*, LD 172, the Secretary of the Interior has restored to tribal ownership much of the unallotted acreage within the Uintah and Ouray Reservation that remained unentered. On August 25, 1945, Secretary of the Interior, Harold L. Ickes, issued an Order of Restoration upon the recommendation of Commissioner of Indian Affairs John Collier,[193] which reads as follows:

> WHEREAS, pursuant to the provisions of the Act of May 27, 1902 (32 Stat. 263), as amended, *the unalloted lands of the Uintah and Ouray Indian Reservation* in the State of Utah, were made subject to disposal under the laws of the United States applying to public lands, and

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litigation deal with retained *proprietary* interests in the unallotted lands rather than with the *jurisdictional boundary* issues raised in this case. Cf. *Rosebud Sioux Tribe v. Kneip, supra*, 430 U.S. at 601 nn. 23-24, 97 S.Ct. at 1370. However, if the 1905 Act had operated to restore the land to the public domain, events may have taken a different course. Cf. F. Cohen, Handbook of Federal Indian Law 334-336 (1942); *Hanson, supra.*

[193] Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of June 19, 1941, JX 450. While Collier's letter recommends restoration of "all the undisposed-of opened lands lying within the former boundaries of the Uintah and Ouray Indian Reservation," he cites as authority Section 3 of the Indian Reorganization Act, which authorizes the Secretary to restore to tribal ownership "the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale or any other form of disposal... See also S.Rep.No.1080, 73d Cong., 2d Sess. (1934). Later in the letter, Collier refers to the lands as the surplus *opened* lands of the Uintah and Ouray Indian Reservation—not "ceded", "former" or some similar designation.

It is important to remember that the restoration of lands was mainly a *proprietary* rather than *jurisdictional* transaction. As to the *jurisdictional* boundaries question, the Collier letter is, at best, ambiguous.

WHEREAS, *there are now remaining undisposed-of within said area* approximately 217,000 acres of unalloted lands, which need closer administrative control in the interest of better conservation practices, and

WHEREAS, by relinquishment and cancellation of homestead entries within this area a limited additional acreage of land of similar character may later be included within *this class of undisposed-of opened land*, and

WHEREAS, the Tribal Council, the Superintendent of the Uintah and Ouray Agency, and the Commission of Indian Affairs have recommended restoration to tribal ownership of such undisposed-of *surplus unallotted lands in the said reservation*;

NOW, THEREFORE, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the Act of June 18, 1934 (48 Stat. 984), I hereby find that the restoration to tribal ownership of all lands which *are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation* will be in the public interest, and the said lands are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, *and are added to and made a part of the existing reservation*, subject to any valid existing rights.

10 Fed.Reg. 12409, LD 183 (emphasis added).

While the Order itself is somewhat ambiguous as to whether the lands restored were thought to be within the political boundaries of the reservation, related departmental documents indicate that Interior deliberately distinguished between the "opened" lands within the continuing boundaries of existing Indian reservations and "ceded" lands purchased by the United States and no longer within

such boundaries; opened lands could be withdrawn from entry and restored to tribal ownership, while "ceded" lands could not. See Instructions, Restoration of Lands Formerly Indians to Tribal Ownership, 54 I.D. 559, 560 JX 431 (1934).[194] While a subsequent opinion by the Solicitor seems to add ambiguity by holding that the Utes "ceded" lands in Colorado, though not within an existing reservation, could be restored under Section 3 of the Indian Reorganization Act, see 56 I.D. 330, JX 442 (1938), they were perceived as an exception to the general rule. Instructions, JX 431, *supra*, at 562.

A number of other parcels of land within the reservation were restored to trust status by subsequent orders. See

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[194] *Id.*: This brings us up to the period of about 1890, at which time there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company v. United States*, 252 U.S. 159 [, 40 S.Ct. 241, 64 L.Ed. 507.]). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations of tribal ownership are to be made under the said Section 3, if in the pubic interest. It can safely be said that it would not be to the interest of the public to restore to the Indians all undisposed of public lands that at one time were in Indian ownership but afterwards became the property of the United States by outright cessions from the Indian owners, because, as stated above, such action would mean the withdrawal in many States of all lands now available for entry as public domain. Such action undoubtedly would raise strong opposition in the various localities affected and have an undesirable bearing on the new Indian legislation.

Though the Supreme Court in *Rosebud* indicated that this document offered "no clear view" on the boundary question, 430 U.S. at 604 n.27, 97 S.Ct. at 1372, it does shed some light on the issue.

Public Land Order No. 2713, 18 Fed.Reg. 426 (Jan. 20, 1953); Public Land Order No. 1310, 21 Fed.Reg. 5015, LD 202 (July 6, 1956); Public Land Order No. 2002, 24 Fed.Reg. 8175, LD 207, (Oct. 8, 1959); Public Land Order No. 2269, 26 Fed.Reg. 1718, LD 208 (Feb. 28, 1961).

The conclusion that the lands restored to tribal ownership were within the existing boundaries of an Indian reservation is buttressed by a formal opinion by the Solicitor for the Department of the Interior construing the scope of the 1945 Secretarial Order. The Solicitor concluded that the order had restored to tribal ownership the mineral estate underlying *fee-patented lands* as well as the whole of the unallotted and unappropriated lands of the reservation:

> The order restores "all lands which are now or may hereafter be classified as undisposed-of opened lands" of the reservation. The minerals in place are a part of the land. The fact that a lesser estate, the surface, has been carved out of the land and disposed of does not make that which is left, the mineral estate, any the less "lands." *British-American Oil Producing Co. v. Board of Equalization of Montana et al.*, 299 U.S. 159 [, 57 S.Ct. 132, 81 L.Ed. 95] (1936).
>
> One of the purposes of the order was to insure closer administrative control of the tribe's property in the interest of better conservation practices. As pointed out above, the beneficial title to the minerals has always been in the Indians. Certainly the Indians' mineral estate can be administered more effectively if the whole estate—the minerals underlying the patented lands—can be administered as a unit rather than by having the minerals underlying the patented lands administered under one set of laws and regulations and the minerals underlying the unpatented lands administered under another set of laws and regulations.

> The order should be construed in such a manner as will result in the accomplishment of its broad purpose. That was to restore to tribal ownership all lands, or interest in lands, to which the superior rights of third parties had not attached.
>
> Therefore, as previously indicated, it is my opinion that the minerals underlying *the patented lands within the Uintah and Ouray Indian Reservation* were restored to tribal ownership by the order of August 25, 1945.

59 I.D. 393, 396 (1947), II Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs, 1917-1974, at 1434, 1435-1436 (1979), JX 454 (emphasis added). The Solicitor reached a similar conclusion as to certain lands within the town of Myton, Utah, "Restoration of Land to Tribal Ownership Under Indian Reorganization Act," M-34912 (Apr. 11, 1947), II Opinions of the Solicitor of the Department of Interior Relating to Indian Afafirs, 1917-1974, at 1450-1451 (1979), and applied a similar analysis to mineral rights underlying certain reclamation withdrawals within the reservation boundaries. "Restoration to Tribal Ownership of Lands Included in a Reclamation Withdawal," M-36142 (Oct. 29, 1952) in *id.*, at 1589-1591. While the statutory references in the 1945 Order itself may be ambiguous, see *Russ v. Wilkins*, 624 F.2d 914, 925 (9th Cir. 1980),[195] the contemporaneous construction of the Order by the Solicitor tends strongly to support this Court's inferences and conclusions. See *Mattz v. Ar-*

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[195] The Order refers both to section 3 of the Indian Reorganization Act, which authorizes restoration of unsold, opened lands, and § 7, which authorizes the addition of new lands to existing reservations. 25 U.S.C. §§ 463, 467. Further the Commission of Indian Affairs recommended restoration of the lands citing section 3 as authority without reference to section 7, JX 450, *supra*. Counsel for the defendant counties erroneously asserts that the restoration was made under section 7 without mention of section 3. Counties' Post-Trial Brief at 91. Counsel's related arguments are, therefore, properly disregarded.

nett, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973).

The "jurisdictional history" of the Uintah and Ouray Reservation is less than clear or consistent. Plaintiff offers evidence of the exercise of federal and tribal criminal jurisdiction over the reservation since 1921; see plaintiff's Exs. 2-15; the defendants offer a similar collection of state prosecutions beginning in 1915 and ending in 1967. See defendants' Ex. DU-9 through DU-33. The annual reports of the Uintah and Ouray Agency range in reference from an acknowledgment of state jurisdiction over the reservation to the assertion of exclusive federal jurisdiction.[196] Other historical exhibits run either direction.[197]

The defendant State of Utah places heavy reliance upon the history of regulation of hunting and fishing on the reservation as "jurisdictional history" probative of their views on the boundary question in general, that the Uintah

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[196] Annual Rept. of the Uintah and Ouray Agency, 1910, JX 344 (state jurisdiction); *id.*, 1911, JX 354 (state, federal jurisdiction); *id.*, 1915, JX 368 (jurisdiction somewhat confused); *id.*, 1916, JX 380 (state jurisdiction); *id.*, 1917, JX 386 (state jurisdiction); *id.*, 1918, JX 393 (state jurisdiction); *id.*, 1919, JX 396 (state laws *inapplicable* to Indian activities on restricted lands); *id.*, 1920, JX 397 (cooperation between agency, county officials); *id.*, 1921, JX 399 (same); *id.*, 1927, JX 415 (federal, state and county jurisdiction; establishment of Indian court recommended); *id.*, 1928, JX 417 (Indian court advocated; federal jurisdiction); *id.*, 1929, JX 420 (Indian court recommended; federal, state laws apply); *id.*, 1930, JX 422 (Indian court recommended; state not interested in offenses within reservation; federal jurisdiction applies to all serious crimes).

[197] See *e.g.*, Opinion of Asst. Utah Atty. Gen. of Aug. 14, 1975, JX 478 (no county jurisdiction); *Uintah Basin Standard*, Nov. 18, 1965, JX 470 (Roosevelt, Utah within "Indian Country"); Letter from Dist. Supt., Indian Field Service to the Comm. of Ind. Aff. of Aug. 5, 1926, JX 412 (opened Uintah Reservation governed by state law). It should be remembered that during this entire period the definitions of jurisdiction in "Indian Country" did not remain static. See pages 1081-1085, *supra*.

and Ouray Reservation is confined to the Ute trust lands. See State of Utah Post-Trial Brief at 47-53, A80-A96; trial transcript at 115-133, 153-154, 175-176, 164-166, 216-218, 238-246, 258-265; ex. I-5-I-15.

The history of hunting and fishing jurisdiction in "Indian country" is unique and anomalous, a hybrid mixture of Indian jurisdictional and proprietary interests. See *United States v. Minnesota*, 466 F.Supp. 1382, 1385 (D.Minn.1979), *affirmed, Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (*per curiam*), *cert. denied*, ___ U.S. ___, 101 S.Ct. 279, 66 L.Ed.2d 136; *Mescalero Apache Tribe v. State of New Mexico*, 630 F.2d 724 (10th Cir. 1980), *vacated*, ___ U.S. ___, 101 S.Ct. 1752, 68 L.Ed.2d 234; F. Cohen, Handbook of Federal Indian Law 285-286 (1942); "Jurisdiction—Hunting and Fishing on the Wind River Reservation," M-31480 (Feb. 12, 1943), II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1185, 1186-1194 (1977). Indian-owned, or trust lands rather than "reservation" lands have often served as the fulcrum in the balance struck between jurisdictions regarding hunting and fishing. Interior Solicitor Mitchell Melich wrote in an opinion on jurisdiction over hunting on the Uintah and Ouray Indian Reservation that it is "well settled that state game laws do not apply to Indians on trust lands within the Indian reservation." M-36813 (Mar. 29, 1974), II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, at 2030, 2031 (1979) (citations omitted). Further, 18 U.S.C. § 1165 provides:

> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to *any Indian or Indian tribe, band or group* and either are held by the United States *in trust* or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon or for the re-

> moval of game, paltries, or fish therefrom shall be fined. . . . [Emphasis added.]

See also H.Rep.No.2593, 85th Cong., 2d Sess. (1958); H.Rep.No.625, 86th Cong., 1st Sess. (1959); S.Rep.No. 1686, 86th Cong., 2d Sess. *Cf. United States v. Sanford*, 547 F.2d 1085, 1089 (9th Cir. 1976).

Finally, in *Montana v. United States*, ___ U.S. ___, ___ ___, 101 S.Ct. 1245, 1254-1259, 67 L.Ed.2d 493 (1981), the Supreme Court expressly held tribal jurisdiction over hunting and fishing to be confined to Indian-owned and "trust" lands.

The unique controversies surrounding the territorial extent of tribal control of hunting and fishing now settled by the rule of *Montana v. United States* is independent of reservation disestablishment in the *Rosebud* sense and does not, therefore, advance this Court's inquiry in any ultimate way.[198]

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[198] See also, Letter from Asst. Comm. of Ind. Aff. to Agency Supt. of Dec. 26, 1924, JX 408 (w/attachments); Letter from Asst. Secretary of the Interior to Sen. Smoot of Feb. 6, 1926, JX 409; Letter from the Comm. of Ind. Aff. to Agency Supt. of May 29, 1926, JX 410; *id.*, of July 28, 1926, JX 411; memorandum to the Solicitor of Dec. 8, 1927, JX 416. The state also relies heavily upon the presence of various signs which indicate that one is "entering", "leaving" or "on Indian land" or "the Uintah and Ouray Reservation." See State of Utah Post-Trial Brief at 44-45.

The general sense of the trial testimony indicates that more often than not the signs were understood to mark the boundary of "Indian land" in a *proprietary* sense, see *e.g.*, Trial Transcript at 137, 155-157, 159-160, 169-170, 176-177, 275-276, 304 so as to put persons on notice, for example, that further ingress on the land might be an unlawful trespass. See Trial Transcript at 276, 299-301, 304; 18 U.S.C. § 1165. Of course, that purpose is defeated if signs are posted at political rather than proprietary boundary lines.

Very little documentary and testimonial evidence was offered as to the *specific* purposes and understandings underpinning the posting of the signs which indicated more than *proprietary* motivations. Cf. Trial Transcript at 160-173.

The older judicial decisions cited by the parties as well carry reduced precedential value, as the United States Court of Appeals for the Tenth Circuit held in *Ute Indian Tribe v. State Tax Comm. of Utah*, 574 F.2d 1007, 1009 (10th Cir. 1978) that the issue of the boundaries of the Uintah and Ouray Reservation is "a matter which required the proof of facts and the application of law." The trial court in that case was reversed because the Court of Appeals was "unable from the record to find any evidence or basis for the determination by the trial court as to the boundaries of the reservation or what might constitute trust lands." *Id.*

Likewise, this Court is unable to discern any substantial evidentiary basis for the statements as to reservation status made in the judicial opinions cited by the parties.[199] The demanding analysis mandated by *Rosebud Sioux Tribe v. Kneip* and related cases cannot be circumvented by reliance upon cursory or presumptive statements in cases litigating other questions. See *Appawora v. Brough*, 431 U.S. 901, 97 S.Ct. 1690, 52 L.Ed.2d 384 (1977), *vacating and remanding*, 553 P.2d 934 (Utah 1976).

One thing is certain: the jurisdictional history of the Uintah and Ouray Reservation is not one of "unquestioned" exercise of state authority. Cf. Counties' Post-Trial Brief at 68. The record evidences substantial jurisdictional

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[199] See *United States v. Fitzgerald*, 201 F. 295, 296 (10th Cir. 1912); *United States v. Boss*, 160 F.132, 133 (D.Utah 1906); *Whiterocks Irrigation Co. v. Mooseman*, 45 Utah 79, 82, 141 P. 459, 460 (1914); *Sowards v. Meagher*, 37 Utah 212, 216-217, 108 P. 1112, 1114 (1910); *contra, State v. Roedl*, 107 Utah 538, 543, 155 P.2d 741, 743 (1945).

The summary "judicial notice" approach to the boundary issue found in these cases was apparently disapproved by the United States Supreme Court in *Brough v. Appawora*, 553 P.2d 934 (Utah 1976), which it vacated and remanded "for consideration in light of *Rosebud Sioux Tribe v. Kneip* . . ." 431 U.S. 901, 97 S.Ct. 1690, 52 L.Ed.2d 384 (1977). That case is now here by removal. See *Brough v. Appawora*, 431 U.S. 901, 97 S.Ct. 1690, 52 L.Ed.2d 384 (1977).

contradictions and confusion, which are now to be resolved by the judgment of this Court.

Other factors not decisive standing alone, when taken together with the record and analysis set forth above, lend support to the conclusion that the Uintah and Ouray Reservation survives, diminished by the national forest and Strawberry Project withdrawals. For example, the immunity of the reservation to selection of state school and indemnity lands[200] justifies an inference that the reservation was not disestablished and its "surplus" acreage "restored to the public domain." While the state asserts alternative reasons for the apparent immunity in an attempt to diminish its probative value herein as a "disestablishment factor,"[201] the fact is that school sections have not been selected and the Interior Department early on took the position that they could not be selected.[201A] The

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[200] State school land selections have never been made within the boundaries of the Uintah Indian Reservation. See Trial Transcript at 241 (testimony of Donald Prince). None were ever asked for. *Id.* at 247. See also *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L.Ed.2d 458 (1980).

[201] See State of Utah Post-Trial Brief at 60-62; Trial Transcript at 241-247; Transcript of Final Arguments at 61-62.

[201A] On April 27, 1905, the Governor of Utah received a communication from Commissioner W. A. Richards of the General Land Office informing him that the State of Utah was not entitled to select sections 2, 16, 32 and 36 in the townships on the reservation because of the status of the lands. While the state consequently could select "in lieu" lands to compensate for those sections, the indemnity selection could not be made within the opened unallotted lands of the Uintah Reservation:

> It follows also that no disposition of the lands can be made that will impair the interests of the Indians, these lands are not subject to selection by the state as indemnity, but must be disposed of in the manner and for the purpose designated by Congress.

Letter of Comm. W. A. Richards, *quoted in Deseret Semi-Weekly News*, Apr. 27, 1905, JX 255, at 5; *Salt Lake Herald*, Apr. 27, 1905,

JX 256, at 8.

Commissioner Richards' Opinion was affirmed by the Secretary of the Interior in Instructions issued June 13, 1905, to the Commissioner:

> The second question presented affects the rights of the State under its grant in support of common schools. In regard to the grant in place, which grant was made by the act of July 16, 1894 (28 Stat., 107), of sections numbered 2, 16, 32 and 36 in each township in said State, it is the opinion of this Department that not only technical rules of statutory construction but also the general scope of legislation bearing upon the disposal to be made of the unallotted portion of this reservation, and the policy of the United States in respect to public schools and also to Indians, call for the denial of any claim on the part of the State to any portion of its school grant in place within the limits of this reservation. Further, that the reasons controlling the decision just arrived at prevent the recognition of any claimed right on the part of the State to select indemnity from the surplus lands of this reservation in further satisfaction of its school grant, prior to the opening thereof, under the provisions of the act of March 2, 1895 (28 Stat., 876, 899), or at all. See *Minnesota v. Hitchcock* (185 U.S. 373). The Department concurs also in your recommendations covering these matters.

33 I.D. 610, 611, JX 274.

The denial of indemnity selections within the opened Uintah lands is consistent with 43 U.S.C. § 851, which provides that "such selections may not be made within the boundaries of said reservation: . . .," if the reservation continues to exist.

Section 851 also provides

> That nothing in this section contained shall prevent any state from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

No such extinguishment and restoration has taken place at Uintah. In contrast, state selections have been been made within the restored Uncompahgre lands. See Trial Transcript at 240-241, 244; Exhibit I-17; see also *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L.Ed.2d 458 (1980).

107, 109, LD 34, provided that school or indemnity sections could not be selected upon Indian reservation lands "until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain." *Id.*, § 6. The Uintah lands have never been so restored, and remain in continuing reservation status. The disestablishment factor of school lands selection within the "opened" area, which supported an opposite conclusion in *Rosebud Sioux Tribe v. Kneip, supra*, is simply lacking here.

Press coverage of the opening of the Uintah Indian Reservation also reflects the continued reservation status of the opened lands. Multiple references are made to "homesteads on the reservation," *e.g., Deseret Evening News*, July 29, 1905, JX 301, at 1, *Deseret Semi-Weekly News*, Sept. 14, 1905, JX 321, at 3; *id.*, Aug. 31, 1905, JX 318, at 3; *id.*, Aug. 28, 1905, JX 316, at 6; *id.*, Aug. 17, 1905, JX 312, at 1; "home-getting on the reservation," *e. g., Deseret Semi-Weekly News*, Aug. 14, 1905, JX 307, at 5; *id.*, Aug. 7, 1905, JX 305, at 1; "filing for lands on the reservation,"*e.g., Deseret Semi-Weekly News*, Sept. 4, 1905, JX 319, at 5; *id.*, Aug. 24, 1905, JX 314, at 2; *id.*, Sept. 7, 1905, JX 320, at 2 ("lands on the reservation"); and other on-reservation matters, *e. g., Deseret Evening News*, July 7, 1905, JX 280, at 1 (townsites set aside "within the reservation"); *Deseret Semi-Weekly News*, Oct. 30, 1905, JX 326, at 1 (Ft. Duchesne townsite "in Uintah Indian Reservation"); *id.*, Sept. 21, 1905, JX 322 at 3 (80-acre farm "in the Uintah Reservation, Utah," awarded to daughter of Jim Bridger); *id.*, Sept. 14, 1905, JX 321, at 3 ("settlers of the reservation," "settlers on the reservation"); *id.*, Aug. 28, 1905, JX 317, at 6 (townsite "in Uintah Reservation"); *id.*, Aug. 14, 1905, JX 306, at 2 (newspaper editor will "go on the reservation" to start paper); *id.*, July 27, 1905, JX 298, at 1 (rights in streams "of the Uintah Reservation"); *id.*, July 20, 1905, JX 294, at 3 ("unallotted land in the Uintah Reservation"); *Deseret*

Evening News, July 19, 1905, JX 293, at 1 ("filing on water of the Uintah Reservation"); *id.*, July 18, 1905, JX 290 ("all eyes now on the reservation"); *Salt Lake Herald*, July 17, 1905, JX 289 at 3 (farming lands "on the Uintah Reservation"); *id.*, July 11, 1905, JX 286, at 1 (old soldiers' colony "on Uintah Reservation"). A well-read public was surely aware that homesteads were being made available *upon an Indian reservation*—not on lands once possessed by Indians now dispossessed, and merely a part of the unreserved public domain.

Another factor is the reference in the 1948 Act adding the Hill Creek Extension to the Uintah and Ouray Reservation. Act of Mar. 11, 1948, ch. 108, 62 Stat. 72, VI Kapp. 375, LD 187. By that legislation, Congress "extended" the "exterior boundary" of the Uintah and Ouray Reservation to include the Hill Creek lands. How could Congress *extend* a boundary that did not exist?

While this Court disagrees with the United States as *amicus* to the extent that the Government asserts that the original boundary of the Uintah Valley Reservation remains undiminished, it is significant that the United States, the Indians' trustee, has asserted that the reservation was not disestablished by Congress under the criteria expressed in *Rosebud* and related cases. The United States' views have carried some weight in other disestablishment cases. See *e.g.*, *Seymour v. Superintendent*, 368 U.S. 351, 357, 82 S.Ct. 424, 427, 7 L.Ed.2d 346 (1962). They are afforded significance herein as well.

Some categories of evidence presented at trial have proven less than illuminating. For example, a map exhibit can be found in the record to stand for any of several propositions that one could make regarding the boundary issues. The maps themselves shine little light on the intent of their makers vis-a-vis the specific issue now before this Court. Their probative value is, therefore, weaker than that of other exhibits and testimony.

What can be generalized from the maps is that for many years the former Uncompahgre Reservation has not been thought to deserve map notation, while at the same time, some version of the Uintah or Uintah and Ouray Reservation has been regularly indicated. This Court's conclusions on the boundary issues find approximate reflection, for example, in the U.S. Geological Survey Maps, see Exhibit I-1A (map; 1959 ed.); P.Ex. 1 (map, 1976 ed.), and in the Bureau of Indian Affairs' "Indian Land Areas" Map, JX Map 21 (1971). See also, Ex. I-3 (BLM Map, 1974 ed). Other Maps such as Ex. I-1B, (BLM Map, 1977 ed.), and Ex. I-4A (BLM Map, 1967 ed.), do not indicate those boundaries because they are maps of proprietary tenure, not legal jurisdiction. Some maps are so poorly reproduced that they are valueless, *e. g.*, JX Map 20; some are useless because their definitive color distinctions have been lost in photo-copying, *e.g.*, JX Maps 1, 9, 11 and 13.

Considerable testimony as well was elicited at trial on the availability of federal services to Indians "on or near" the Uintah and Ouray Reservation, and on the alleged "reputation" in the community as to boundaries of the reservation. Since eligibility of Indians for Federal services is not strictly reservation boundary-dependent, see *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1973), testimony on that subject is at best ambiguous on reservation boundary issues.

The reputation evidence is also afforded less weight than other evidence in the record. While, as counsel for the counties points out, such reputation evidence is generally admissible in federal court under Rule 803(20),[202] its reliability in these specific circumstances is suspect.

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[202] Rule 803(20) of the Federal Rules of Evidence provides this exception to the Hearsay Rule (see Rule 802, F.R.Ev.):

> *Reputation concerning boundaries or general history.* Reputation in a community, arising before the controversy, as to boundaries

While a long-standing reputation may serve as important evidence of the status of a boundary of immediate personal importance, *e. g.*, a private property line among neighbors, or of more universal importance, such as a national or state boundary, reputation in a *non-Indian* community as to *Indian* boundaries, rights, etc., is indeed a treacherous ground for decision. As the Advisory Committee Notes to the Federal Rules of Evidence, Rule 803(20), point out:

> Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusions if any has been found, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, . . .

To have significant probative value, the matter in question "must be one of general interest, so that it can accurately be said that there is a high probability that the matter underwent general scrutiny as the community reputation was formed." McCormick on Evidence § 324, at 750 (2d ed. 1972) (footnote omitted). Wigmore states this "general interest" requirement even more emphatically:

> [T]he facts for which such an opinion or reputation can be taken as trustworthy must . . . be such facts as have been of interest to *all members of the community* as such, and therefore have been so likely to receive general and intelligent discussion and examination by competent persons, so that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage

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of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

> of controversy and had become settled with fair finality.

5 Wigmore on Evidence § 1598, at 564-565 (Chadbourn rev. 1974) (emphasis in original); see also *id.*, §§ 1583-1597.

Applying the theoretical underpinnings of Rule 803(20) to the record herein, the reputation in the non-Indian community as to Ute boundaries, *arising before this controversy*, seems as much based upon the proprietary nature of "Indian lands" as anything else, *e. g.*, Trial Transcript 175-180, diminishing its trustworthiness on the jurisdictional question. Tribal jurisdiction was not an issue before the commencement of this controversy simply because it was not asserted over non-Indians before then to any great extent. Thus tribal jurisdiction was not a topic "likely to have been inquired about" by the non-Indian community; counsel for the State himself asserts that something as significant to Indians as the organization of the tribe under a constitution in 1937 was an event that "didn't get any publicity or attention" in the local non-Indian communities, nor did it "attract the attention of the State." Transcript of Final Arguments at 37 (argument of Mr. Dewsnup).

Furthermore, the evidence of reputation among that segment of the community that is the most likely to inquire about tribal jurisdiction, *i. e.*, the Indians, is largely absent from the record herein. Trial testimony indicates that discussion of such subjects between Indians and non-Indians was extremely limited. *E. g.*, Trial Transcript at 175 (testimony of Gordon Harmston.[202A] The Federal courts have

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[202A] Trial Transcript at 175:

* * * * * * *

> Q Did you have occasion to talk about boundary questions with any of those people?
>
> A Indians are rather non-communicative, and unless you ask di-

eschewed the use of boundary by acquiescence, mutual reliance, or estoppel in cases involving the determination of Indian reservation boundaries, see *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 117-118 (9th Cir. 1980), and with good reason. Federal Indian law is a field of unique texture and complexity and, recalling that the primary focus of the inquiry herein is congressional intent, *Rosebud Sioux Tribe v.Kneip, supra*, the reputation evidence found in the record here is of less than material importance.[202B]

Finally, this Court has reached the conclusions on the reservation status of the Uintah lands based upon the overall sense of the historical record concerning the Uintah Reservation in contrast to the treatment of the old Uncompahgre Reservation over the same period. To say that both reservations were disestablished by Congress would require this Court to ignore the marked distinctions, contrasts, and inconsistencies that characterize the respective approaches to each reservation. The overall tone of the evidentiary record harmonizes with a finding that the Uintah and Ouray Reservation continues in Indian reservation status, dimished only by the national forest and Strawberry Project withdrawals.

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rect questions, you do not get an answer. So I don't ever recall discussing that with anyone of Indian extraction.

* * * * * *

It must also be observed that with unfortunate consistency, the assertion of Indian tribal rights and powers to their lawful extent puts Indians at odds with their non-Indian neighbors. *E.g., Washington v. Washington State Commercial Passengers Fishing Vessel Association*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). Non-Indians in an Indian reservation setting are often far from being dispassionate observers of historical events. Cf. *United States v. Kagama*, 118 U.S. 375, 384, 6 S.Ct. 1109, 1114, 30 L.Ed. 228 (1886).

[202B] The offer of a local cafe's dinner table placemat, JX 485, as indirect corroboration of a specific congressional intent to disestablish the Uintah Indian Reservation presses the admissibility of the joint exhibits to the limits of Rule 401 of the Federal Rules of Evidence.

X. THE GENERAL ALLOTMENT ACT

Both plaintiff and defendants in this case assert that the legislation dealing with the Uintah and Uncompahgre Reservations should be construed in light of the provisions of the Dawes Act, or General Allotment Act of 1887, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, I Kapp. 33 (2d ed. 1904), LD 13. See Plaintiff's Post-Trial Brief at 19-22 ff; Defendant Counties' Post-Trial Brief at 6-18; Transcript of Final Arguments at 63-81. Plaintiff argues that the general operation of the General Allotment Act was to allot and open the Indian reservations while continuing the reservation status of the lands. Defendant Counties assert that the general operation of the Act was the opposite, to reduce the territorial boundaries of reservations following allotment through the restoration of the "surplus" unallotted lands to the public domain. Each party would resolve ambiguities in the legislative materials in its own favor by infusing the specific language at issue with its chosen interpretation of the operative effect of the General Allotment Act. This Court has reviewed the general descriptions of allotment policy expressed in a number of the exhibits.[203] Further, this Court has looked to treatises and scholarly works dealing with the allotment program in search of such a generalized effect of the General Al-

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[203] See generally, Ann. Rept. of the Comm. of Ind. Aff., 1880, JX 4 at xvii; Rept. of the Secretary of the Interior, 1885, JX 9, at 24-28; Proceedings of the Third Ann. Lake Mohonk Conference (Oct. 1885), JX 11, at 34-59; Rept. of the Secretary of the Interior, 1886, JX 13, at 3-4; Ann. Rept. of the Comm. of Ind. Aff., 1887, JX 16, at iv-xiv; Rept. of the Secretary of the Interior, 1888, JX 17, at xxvii-xxxiii; Rept. of the Comm. of Ind. Aff., 1890, JX 18, at 3-4; Rept. of the Secretary of the Interior, 1890, JX 19, xxiii-xxiv; *id.*, 1891, JX 22, at vi; *id.*, 1892, JX 28 at vii-viii, xxxii-xxxiii; *id.*, 1894, JX 34, at iv; Rept. of the Comm. of Ind. Aff., 1891, at 4-9, 26, 44-47; *id.*, 1892, JX 27, at 5, 74; *id.*, 1893, JX 31, at 30; *id.*, 1905, JX 328, at 1784-1793; *id.*, 1906, JX 334, at 80-85; 26 Cong.Rec. 6233-6252, 7683-7708, 8251-8253, 8263-8271 (1894). LD 32.

lotment Act on reservation boundaries. See D.S. Otis, The Dawes Act and the Allotment of Indian Lands (Prucha ed. 1973); F. Cohen, Handbook of Federal Indian Law 334-336, 206 ff (1942); S.L. Tyler, A History of Indian Policy 95-124 (1973); W. Washburn, The Indian in America 233-249 (1975); F. Prucha, ed., Americanizing the American Indians (1973); D. Getches, et al., Cases and Materials on Federal Indian Law (1979); M. Price, Law and the American Indian (1973); 1 American Indian Policy Review Commission, Final Report 61-69 (comm. print 1977); F. Prucha, ed., Documents of United States Indian Policy 153-214 (1975); I, II W. Washburn, ed., The American Indian and the United States: A Documentary History 282-904 (1973).

No doubt the General Allotment Act was understood as a method for ultimately ending the Indian reservation system. President Theodore Roosevelt colorfully described the General Allotment Act as "a mighty pulverizing engine to break up the tribal mass."[204] As Secretary of the Interior Carl Shurz explained in 1880:

> [Allotment] will eventually open to settlement by white men the large tracts of land now belonging to the reservations,but not used by the Indians. It will thus put relations between the Indians and their white neighbors in the western country upon a new basis, *by gradually doing away with the system of large reservations*, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions.

Rept. of the Secretary of the Interior, 1880, H.Exec. Doc.No.1, pt. 5, 46th Cong., 3d Sess. at 3 (emphasis added). The processes of the General Allotment Act were indeed

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[204] President's First Annual Message to Congress, Dec. 3, 1901, *reprinted in* 35 Cong.Rec. 81, 90, LD 64 (1902).

understood to be gradual.[205] The annual report of the influential Board of Indian Commissioners commented:

> This bill, which became a law on the 8th of February, 1887, is a great step in advance in our Indian policy, and the day when it was approved by the President may be called the Indian emancipation day.
>
> * * * * * *
>
> It is plainly the ultimate purpose of the bill to abrogate the Indian tribal organization, to abolish the reservation system and to place the Indians on an equal footing with other citizens of the country.
>
> *We do not look for the immediate accomplishment of all this. The law is only the seed, whose germination and growth will be a slow process, and we must wait patiently for its mature fruit.*

Ann. Rept. of the Board of Indian Commissioners, 1888, *quoted in* Tyler, A History of Indian Policy 95-96 (1973) (emphasis added). As the Supreme Court explains in *Mattz v. Arnett*, 412U.S. 481, 93 S.Ct.2245, 37 L.Ed.2d 92 (1973), "Under the 1887 Act, . . . , the President was not required to open reservation land for allotment; he merely had the discretion to do so. In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotment." *Id.*, 412 U.S. at 497, 93 S.Ct. at 2254 (footnote omitted). In fact, Congress

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[205] Consider the colloquy with Professor James B. Thayer of the Harvard Law School as to the effect of the General Allotment Act:

> Q "When would the reservation cease to be a reservation?"
> A [Thayer] "It would cease to be a reservation when the tribe ceases to be."
>
> * * * * * *

Proceedings of the Fifth Ann. Conference (Sept. 1887), JX 15, at 84.

enacted 108 separate pieces of legislation directing the allotment of specific reservations. See 2 American Indian Policy Review Commission, Task Force No. 9, Report on Federal Indian Law Consolidation, Revision and Codification 235-246 (comm. print 1976). The manner of opening the "surplus" unallotted lands of the reservation to white settlement under those acts was hardly uniform or consistent. Some of the acts provided for the outright cession of the unallotted lands;[206] some provided for a cession in trust;[207] some provided that the unallotted lands would be "restored to the public domain"[208] or to status as "public lands;"[209] other acts simply provided that the unallotted lands would be opened for settlement;[210] and still other of the acts mandated allotment without opening the reservations at all.[211] Reviewing this significant body of legis-

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[206] See *e.g.*, Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1022, 1026, 1032, 1035, 1039, I Kapp. 407-437 (6 cession agreements ratified); Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 326, I Kapp. 520, 536-541; Act of June 6, 1900, ch. 813, 31 Stat. 672, I Kapp. 704; Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1078, III Kapp. 124, 155-156; Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352, III Kapp. 87.

[207] See *e.g.*, Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, I Kapp. 328 (ceded lands "restored to the public domain"); Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254, III Kapp. 71; Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016, III Kapp. 117.

[208] See *e.g.*, Act of July 1, 1892, ch. 140, 27 Stat. 62, I Kapp. 441; Act of Feb. 20, 1895, ch. 113, 28 Stat. 677, I Kapp. 555; Act of May 29, 1908, ch. 216, 35 Stat. 444, 457, III Kapp. 356, 370.

[209] See *e.g.*, Act of Feb. 13, 1891, art. V, ch. 165, 26 Stat. 749, I Kapp. 389.

[210] *E.g.*, Act of June 17, 1892, ch. 120, 27 Stat. 52, I Kapp. 439; Act of May 29, 1908, ch. 217, 35 Stat. 458, III Kapp. 371; Act of Dec. 21, 1904, ch. 22, 33 Stat. 595, III Kapp. 110; Act of Feb. 14, 1913, ch. 54, 37 Stat. 675, III Kapp. 555.

[211] *E.g.*, Act of Mar. 2, 1889, ch. 422, 25 Stat. 1013, I Kapp. 344; Act of Jan. 12, 1891, ch. 65, 26 Stat. 712, I Kapp. 383; Act of Mar. 2, 1895, ch. 188, 28 Stat. 876, 907, I Kapp. 559, 566-567; Act of Feb. 11, 1901, ch. 350, 31 Stat. 766, I Kapp. 713; Act of Mar. 3, 1911, ch. 210, 36 Stat. 1058, 1063, III Kapp. 487, 492-493.

lation as a whole, no single, specific pattern emerges. Not even the exhaustive study of allotment prepared by Dr. D.S. Otis offers a universal rule of construction of those statutes based upon the operation of the General Allotment Act.[212] Instead, the courts must look to the particular terms of statute or statutes affecting the reservation lands under consideration, the legislative history of the statutes and the unique historical circumstances surrounding them.

This Court has no problem with the proposition that the Uintah Indian Reservation was allotted pursuant to the general principles of the General Allotment Act as applied by the 1902-1905 Ute legislation. Congress expressly provided for that, and the Court of Appeals for this Circuit has found that to be the case. See Joint Resolution of June 19, 1902, Res. No. 31, 32 Stat. 744 I Kapp. 799, 800 (2d ed. 1904), LD 85, and page 116 n. 133, *supra*; *United States v. Gray*, 201 F. 291, 292 (8th Cir. 1912). Even if this Court adopts the approach of courts in other cases and construes the Ute legislation *in pari materia* with the General Allotment Act,[213] the operation of the 1887 Act is no interpretative talisman compelling this Court to reach one result as opposed to any other.

XI. SUMMARY and CONCLUSION

In deciding the issues presented in this case, the Court has undertaken a fairly meticulous review of the legal and

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[212] See D. Otis, The Dawes Act and the Allotment of Indian Lands (Prucha ed. 1973), originally printed as "A History of the Allotment Policy," *in* "Readjustment of Indian Affairs," Hearings, House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 9, at 428-489 (1934). This work is cited with approval in *Mattz v. Arnett*, 412 U.S. 481, 496 n.18, 93 S.Ct. 2245, 2253, 37 L.Ed.2d 92 (1973).

[213] See *United States v. Jackson*, 280 U.S. 183, 196, 50 S.Ct. 143, 147, 74 L.Ed. 361 (1930); *Stevens v. Commissioner of Internal Revenue*, 452 F.2d 741, 746 (9th Cir. 1971); *Kirkwood v. Arenas*, 243 F.2d 863, 866 (9th Cir. 1957); c.f. *DeCoteau v. District County Court*, 420 U.S. 425, 432, 95 S.Ct. 1082, 1087, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 496, 93 S.Ct. 2245, 2253, 37 L.Ed.2d 92 (1973).

historical materials concerning the status of the Uintah and Ouray Reservation as it has evolved over the past 120 years.[214] As the Supreme Court has long recognized:

> [W]e are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, "courts, in construing a statute may with propriety recur to the history of the times when it was passed." *United States v. Union Pacific R. Co.*, 91 U.S. 72, 79, [23 L.Ed. 224].

Great Northern Ry. Co. v. United States, 315 U.S. 262, 273, 62 S.Ct. 529, 533, 86 L.Ed. 836 (1942); see also *Winona and St. Peter R. Co. v. Barney*, 113 U.S. 618, 625, 5 S.Ct. 606, 609, 28 L.Ed. 1109 (1885); *Smith v. Townsend*, 148 U.S. 490, 494, 495, 13 S.Ct.634, 635, 37 L.Ed. 533 (1893); *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 14, 14 S.Ct. 11, 15, 37 L.Ed. 975 (1893);*supra*, notes 18-20 and accompanying text. This is particularly true where legislation affecting Indians is concerned. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665-669, 99 S.Ct. 2529, 2536-2538, 61 L.Ed.2d 153 (1979); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 98 S.Ct. 1011, 1019, 55L.Ed. 209 (1978); *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 621-623 (2d Cir. 1980). At the same time the limitations inhering in the use of the historical materials remain apparent; this Court is called upon to determine the present meaning of statutes under circumstances not imagined by their draftsmen. Members of Congress in 1905 firmly believed that the "Indian Problem" would dissipate in a short time:

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[214] While this Court has consistently advocated the value of brevity in legal writing, I also recognize that in any given case one must cut the cloth to fit the pattern. The above-entitled action offers a pattern that is unusual in its extent and complex detail.

> I believe that if we follow the policy which has been inaugurated within the last ten or twelve years, and which the members of the Committee on Indian Affairs in the House and in the Senate have supported, within a generation there will be no Indian problem, no Indian question of any magnitude.

39 Cong.Rec. 1139 (Jan. 20, 1905) (remarks of Rep. Lacey), LD 103. Of course, that has not been the course of events resulting from the allotment program. See *e. g.*, S.L. Tyler, A History of Indian Policy (1973); 1 American Indian Policy Revew Commission, Final Report (comm. print 1977); E. Kickingbird and K. Ducheneaux, One Hundred Million Acres (1973); F. Cohen, Handbook of Federal Indian Law (1942). The allotment program was probably one of the best-intentioned grievous errors in the history of American policy-making. By the 1920's, the mistake had become obvious to observers, *e. g.*, L. Meriam, ed., The Problem of Indian Administration (1928), and Congress expressly abandoned allotment as a policy in 1934. See Act of June 18, 1934, § 1, ch. 576, 48 Stat. 984, LD 172, *codified* at 25 U.S.C. § 461 (1976); F. Cohen, Handbook of Federal Indian Law 83-88 (1942). Allotment as a policy remains abandoned, but its voluminous legacy of legislation survives, awaiting interpretation by the courts based upon the intent of congressmen long since gone. In subsequent administrative documents the Court is asked to perceive fine shadings of meaning as to what was or was not an Indian reservation at a time when the executive officials were themselves uncertain. See "Judicial and Departmental Construction of the Words 'Indian Reservation' " (Dec. 29, 1945), II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, at 1378-1379 (1979).

Even conceding the theoretical limitations of the evidentiary record, important findings can be extracted and sound conclusions can be rationally arrived at. Four of

these conclusions are: (1) That the original boundaries of the Uncompahgre Reservation as established by Executive Order in 1882 have been disestablished by Congress and no longer exist, Act of June 7, 1897, 30 Stat. 62, 87; (2) That the original boundaries of the Uintah Valley Indian Reservation have been diminished by Congress through the withdrawal of the Gilsonite Strip in 1888 by agreement with the Utes, through the withdrawal of 1,010,000 acres of timber land and their inclusion in the contiguous national forest reservations pursuant to the Act of Mar. 3, 1905, 33 Stat. 1048, and through the withdrawal of nearly 56,000 acres of land for the Strawberry reclamation project by the Act of April 4, 1910, 36 Stat. 269, 285; (3) Save as thus expressly diminished, the lands of the Uintah Valley Indian Reservation retain continuing status as lands within the boundaries of an Indian reservation, and are "Indian Country" as a matter of federal law, see 18 U.S.C. § 1151(a)(1976); and (4) That the reservation boundaries of the former Uintah Valley Reservation, now the Uintah and Ouray Indian Reservation, have been extended by Congress to include the lands known as the Hill Creek Extension pursuant to the Act of Mar. 11, 1948, 62 Stat. 72.

The map annexed to this opinion as Appendix B and thereby made a part hereof generally outlines the boundary described by these four conclusions.[215]

Standing on its own, each separate conclusion finds solid support in the record in this case. Taken together they effectively summarize the preponderant sense of the evidence on the boundary issues. This Court's findings and conclusions on the present territorial extent of the Uintah and Ouray Indian Reservation have strength beyond that afforded by the clear preponderance of the evidence; they are fortified "by that 'eminently sound and vital canon',"

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[215] If the parties hereto so desire, a stipulated legal description of the boundary determined here, expressed in metes and bounds, may be submitted for approval by this Court.

Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7, 96 S.Ct. 1793, 1796, 48 L.Ed.2d 274 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 84, 39 S.Ct. 40, 63 L.Ed. 138 (1918). *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); accord, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977): (In determining [congressional] intent, we are cautioned to follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973), quoting *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930); . . .); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 484, 99 S.Ct. 740, 753, 58 L.Ed.2d 740 (1979);*McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173-175 & n.13, 93 S.Ct. 1257, 1262-1263, 36 L.Ed.2d 129 (1973); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 n.2, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968); *Squire v. Capoeman*, 351 U.S. 1, 6-7, 76 S.Ct. 611, 614-615, 100 L.Ed. 883 (1956); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 353-354, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); *Choctaw Nation v. United States*, 119 U.S. 1, 28, 7 S.Ct. 75, 90, 30 L.Ed. 306 (1886); *The Kansas Indians*, 72U.S. (5 Wall.) 737, 760, 18 L.Ed. 667 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832)(J. McLean, concurring).

Federal Indian law applies a second relevant canon of construction forbidding any assumption "that Congress

would intend to change the reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction. *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir. 1977). The strong policies against "checkerboard" jurisdiction are described by Justice Douglas in his dissenting opinion in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).[216] The Supreme Court has indicated that such an impractical result is not to be imputed to Congress without specific language to that effect. See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478, 96 S.Ct. 1634, 1643, 48 L.Ed.2d 96 (1976); *Seymour v. Superintendant*, 368 U.S. 351, 358, 82 S.Ct. 424, 428, 7 L.Ed.2d 346 (1962); *United States v. Long Elk, supra*, 565 F.2d at 1039 & n.12.[217] No such specific language, or clear intent to that effect, is found here.

Instead it is readily apparent that the opening of the Uintah Reservation under the 1905 Act, like the opening in *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), was "completely consistent with continued reservation status." *Id.*, at 497, 93 S.Ct. at 2254. As in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), "the Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id.* at 356, 82 S.Ct. at 427. Someone who regularly read the *Deseret*

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[216] See note 46, *supra*.

[217] As the map exhibits demonstrate, disestablishment of the Uintah reservation would indeed result in checkerboard jurisdiction in the Uintah basin. This contrasts with the settlement pattern in *Rosebud*, which left the reservation "compact and in a square tract." 430 U.S. at 595, 97 S.Ct. at 1367. Congress rejected a bill introduced by Senator Rawlins in 1901 that would have resulted in a similar pattern at Uintah. See 1112-1114 & note 128, *supra*.

Evening News in 1905 would know that. It is equally apparent to this Court.

"[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909). *Mattz, supra*, 412 U.S. at 504-505, 93 S.Ct. at 2257-2258.[217A] The "face of the legislation" its "legislative history" and the "surrounding circumstances" as evidenced by the record in this case wholly lack the clear expression of congressional intent to disestablish the diminished Uintah reservation under the principles of *Rosebud Sioux Tribe v. Kneip, supra*. The "hard evidence" necessary to overcome the construction of ambiguities in favor of the Indians, *United States v. Long Elk, supra*, is simply not there.

Declaratory relief on the boundary questions is, therefore, granted in favor of the plaintiff Ute Indian Tribe as to the lands within the Uintah and Ouray Reservation as defined above. Declaratory relief is granted in favor of the defendants as to the national forest, Strawberry project, 1888 "gilsonite strip" lands, and the lands of the 1882 Uncompahgre Reservation not included within the 1948 Hill Creek Extension.[218]

The Tribe's prayer for injunctive relief, however, is another matter. The Tribe's allegations of immediate, irre-

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[217A] This remains true today. Congress may still determine or modify the boundaries of the Uintah and Ouray Reservation by appropriate legislation.

[218] To the extent that the Tribe's complaint seeks declaratory relief affirming the validity of the Ute Law and Order Code in all of its specific provisions, an advisory opinion is asked for and is hereby denied. The validity of given sections of the Ute Code, or any statutory code, are best evaluated in case-by-case litigation. Tribal *jurisdiction* within the reservation boundaries as a general concept, however, is expressly affirmed.

parable harm not remediable at law, a necessary foundation of federal injunctive relief, are nearly six years old. No hard evidence of an immediate threat of irreparable injury to the Tribe at the hands of the defendants appears in the present record. Nor *should* evidence of such a grave threat arise.

Two of the jurisdictional issues most important to the parties, tribal criminal jurisdiction over non-Indians and tribal regulation of non-Indian hunting and fishing off of tribal lands, have already been resolved by the United States Supreme Court. In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the Court held that the Indian tribes do not have inherent power to try and punish non-Indians for criminal offenses. In *Montana v. United States,* ___ U.S. ___, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), the Court restricted tribal control of hunting and fishing to Indian-owned and Indian trust lands.

Of course, an expansive reservoir of sovereign tribal authority remains intact. See *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The scope of tribal civil jurisdiction over non-Indians within Indian country was expressed in *Montana v. United States, supra,* by Justice Stewart:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee,* 358 U.S. 217, 223 [79 S.Ct. 269, 272, 3 L.Ed.2d 251]; *Morris v. Hitchcock,* 194 U.S. 384 [24 S.Ct. 712, 48 L.Ed. 1030]; *Buster v. Wright,* 135 F.2d 947, 950

(CA8); see *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, [100 S.Ct. 2069, 65 L.Ed.2d 10]. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court,* 424 U.S. 382, 386 [96 S.Ct. 943, 946, 47 L.Ed.2d 106]; *Williams v. Lee,* 358 U.S. 217, 220 [79 S.Ct. 269, 270, 3 L.Ed.2d 251]; *Montana Catholic Missions v. Missoula County,* 200 U.S. 118, 128-129 [26 S.Ct. 197, 200-201, 50 L.Ed. 398]; *Thomas v. Gay,* 169 U.S. 264, 273 [18 S.Ct. 340, 343, 42 L.Ed. 740].

___ U.S., at ___, 101 S.Ct., at 1258. See also Collins, "Implied Limitations on the Territorial Jurisdiction of Indian Tribes," 54 *Wash.L.Rev.* 479 (1970). The Supreme Court has expressly confirmed the power of Indian tribes to tax non-Indians entering the reservation to engage in economic activity, *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152-154, 100 S.Ct. 2069, 2080-2081, 65 L.Ed.2d 10 (1980); see also *Merrion v. Jicarilla Apache Tribe,* 617 F.2d 537 (10th Cir. 1980) (en banc), *cert. granted,* ___ U.S. ___, 101 S.Ct. 71, 66 L.Ed.2d 21, as well as to regulate at least some forms of activity on fee lands. *United States v. Mazurie,* 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). See also Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*[219]

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[219] As Justice Steward commented in *United States v. Montana, supra,* "this Court has held that the Indian tribes retain rights to river waters necessary to make their reservations livable, *Arizona v. California,* 373 U.S. 546, 599 [83 S.Ct. 1468, 1497, 10 L.Ed.2d 542]." *Id.,* ___ U.S. at ___ n.15, 101 S.Ct., at 1258. This apparently includes the power to control the use of that water. See *Colville Confederated Tribes v. Walton,* 460 F.Supp. 1320, 1332 (E.D. Wash.1978) *affirmed in part, reversed in part and remanded,* 647 F.2d 42 (9th Cir. 1981); 46 Fed.Reg. 944 (Jan. 5, 1981).

The determination herein of the territorial extent of the Uintah and Ouray Indian Reservation bears important implications for the allocation of jurisdiction among federal, tribal, state and local authorities in the Uintah basin. See e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Central Machinery Co. v. Arizona State Tax Comm.*, 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Williams v. Lee*, 358 U.S. 217, 219-220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1958).[219A] Far from engendering "absolute chaos and disastrous consequences"[220] this Court's determination of the boundaries of the Uintah and Ouray Indian Reservation should simplify the administration of the law by resolving the nagging disputes that have marked the "jurisdictional history" of that area for years. The evolving principles of federal Indian law and jurisdiction, while not quite a clockwork free of internal frictions,[221] offer the guidance needed

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[219A] Of course, criminal cases arising upon the reservation among non-Indians remain within the exclusive jurisdiction of the State, *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1881), *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946), as do civil matters not involving Indians or Indian interests. Cf, *Utah & Northern Ry. v. Fisher*, 116 U.S. 28, 31, 6 S.Ct. 246, 247, 29 L.Ed. 542 (1885); *Langford v. Monteith*, 102 U.S. 145, 26 L.Ed. 53 (1880); Ute Law and Order Code § 1-2-5 (1975). Nothing in this Court's judgment herein relates in any way to land titles or proprietary interests in lands. Compare *Oneida Indian Nation v. County of Oneida, N.Y.*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); "Symposium on Indian Law: The Eastern Land Claims," 31 *Maine L.Rev.* 5-211 (1979). The issues herein involve legal *jurisdiction*, not ownership.

[220] Letter from Ass't. Utah Atty. Gen. R. Dewsnup to the Court, June 25, 1980, at 3.

[221] See R. Barsh and J. Henderson, The Road: Indian Tribes and Political Liberty (1980).

to settle in an orderly fashion future jurisdictional disputes that may arise.

The denial of injunctive relief at this point is, however, a denial without prejudice. If circumstances shall arise that justify invoking the exercise of this Court's equitable powers, this Court stands ready to exercise such continuing jurisdiction upon the making of an appropriate record, and to enter such orders as are necessary in order to effectuate its judgment, or as needed in aid of its jurisdiction. *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 692-696 & nn. 32, 36, 99 S.Ct. 3055, 3078-3080, 61 L.Ed.2d 823 (1979); *United States v. Michigan,* 508 F.Supp. 480 (W.D.Mich. 1980). The defendants are reminded that a refusal of their officers to recognize legitimate tribal judicial and governmental authority on the reservation is at least to some extent state interference with tribal sovereignty. "While it is clear that tribal reservation sovereignty is not congruent with state sovereignty, such sovereignty as the tribes do possess is entitled to recognition and respect both by state and federal governments." *Davis v. Muellar,* 643 F.2d 521, 525-526 & nn. 8-9 (8th Cir. 1981).[222]

With confidence that the effectuation of this Court's judgment will be approached by all parties with a spirit of open-minded cooperation, this Court hereby ORDERS that this Opinion serve as findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure, and that judgment be entered consistent with these findings and conclusions, pursuant to Rule 58, Federal Rules of Civil Procedure.

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[222] As the United States Court of Appeals for the Eighth Circuit notes in *Davis v. Muellar, supra,* "the trust responsibility of the Federal Government includes protecting tribal sovereignty." *Id.* at 525.

APPENDIX A

1. Executive Order of October 3, 1861, I Kapp. 900 (2d ed. 1904), LD 2:

DEPARTMENT OF THE INTERIOR
Washington, October 3, 1861

SIR: I have the honor herewith to submit for your consideration the recommendation of the Acting Commissioner of Indian Affairs that the Uintah Valley, in the Territory of Utah, be set apart and reserved for the use and occupancy of Indian tribes.

In the absence of an authorized survey (the valley and surrounding country being as yet unoccupied by settlements of our citizens), I respectfully recommend that you order the entire valley of the Uintah River within Utah Territory, extending on both sides of said river to the crest of the first range of contiguous mountains on each side, to be reserved to the United States and set apart as an Indian reservation.

Very respectfully, your obedient servant,

CALEB B. SMITH, *Secretary.*

THE PRESIDENT.

EXECUTIVE OFFICE, *October 3, 1861*

Let the reservation be established, as recommended by the Secretary of the Interior.

A. LINCOLN.

2.Act of May 5, 1864, ch. 77, 13 Stat. 63, LD 3:

May 5, 1864.

CHAP. LXXVII.—*An Act to vacate and sell the present Indian Reservation in Utah Territory, and to settle the Indians of said Territory in the Uintah Valley.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and required to cause the several Indian reservations heretofore made, or occupied as such, in the territory of Utah, excepting Uinta valley, to be surveyed into tracts or lots, not exceeding eighty acres each, under the direction of the commissioner of the general land-office, and upon the completion of such surveys shall cause said tracts or lots to be sold, upon sealed bids, to be duly invited by public advertisement, for a period not less than three months, in a newspaper of general circulation published in the territory of Utah, and also a newspaper published in Washington, to the highest and best bidder; said bids may be filed with the governor of said territory at the seat of government thereof, and with the Secretary of the Interior in Washington; such bids as may be received by said governor shall, without opening the same, be forwarded to the Secretary of the Interior, when the same, with the bids filed with him, shall be opened in the presence of the Secretary of the Interior, the commissioner of public lands, and the commissioner of Indian affairs, and any bidders who may choose to be present at the opening thereof; and the Secretary of the Interior shall apply the proceeds of such sales to the construction of improvements upon the reservations which may be established under the provisions of this act, or by other lawful authority, or to the purchase of stock, agricultural implements, or such other useful articles as to him may seem best adapted to the wants and requirements of the Indians: *Provided,* That no tract of land shall be sold under the provisions of this section for less than its appraised value in cash, to be duly ascertained by commissioners appointed by the Secretary of the Interior for that purpose.

Indian reservations in Utah Territory to be surveyed and sold.

Uinta valley excepted.

Mode of sale.

Proceeds of sales, how to be applied.

Minimum price.

The Indians in the territory to be settled in the Uinta valley.

SEC. 2. *And be it further enacted,* That the superintendent of Indian affairs for the territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory, as may be found practicable in the Uinta valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same.

Appropriation for agricultural improvements therein.

SEC. 3. *And be it further enacted,* That, for the purpose of making agricultural improvements in the Uinta valley for the comfort of the Indians who may inhabit the same, and to enable them to become self-sustaining by means of agriculture, there is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of thirty thousand dollars, which sum shall be expended by the superintendent of Indian affairs for said territory, under the instruction of the Secretary of the Interior.

APPROVED, May 5, 1864.

3.Act of June 15, 1880, ch. 223, 21 Stat. 199, I Kapp. 180 (2d ed. 1904), LD 11:

June 15, 1880.

21 Stat., 199.

CHAP. 223.—An act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado, for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same.

Preamble.

See note to 1874, ch. 136, ante, p. 151.

Whereas certain of the chiefs and headmen of the confederated bands of the Ute tribe of Indians, now present in the city of Washington, have agreed upon and submitted to the Secretary of the Interior an

agreement for the sale to the United States of their present reservation in the State of Colorado, their settlement upon lands in severalty, and for other purposes; and

See 1895, ch. 113, post, p. 555.

Whereas the President of the United States has submitted said agreement, with his approval of the same, to the Congress of the United States for acceptance and ratification, and for the necessary legislation to carry the same into effect: Therefore

Ute Indians in Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That said agreement be, and the same is hereby, accepted, ratified, and confirmed: *Provided,* That the said agreement shall be amended by adding to the first clause thereof, after the words "guilty parties", the words following, to wit: "Until such surrender or apprehension, or until the President shall be satisfied that the guilty parties are no longer living or have fled beyond the limits of the United States, the proportion of the money, hereinafter provided, coming to that portion of the Ute Indians known as the White River Utes, except for removal and settlement, shall not be paid"; and by adding to the third express condition of said agreement after the word "forever", the words following, to wit: "*Provided,* That the President of the United States may, in his discretion, appropriate an amount thereof, not exceeding ten thousand dollars, for the education in schools established within or beyond the limits of the lands selected, of such youths of both sexes as in his judgment may be best qualified to make proficiency in practical industries and pursuits necessary for their self-support, and out of the portion of said moneys coming to the White River Utes, the United States shall pay annually to the following-named persons,

Proviso.

Agreement for sale of lands.

Amended and ratified.

Proviso.

Schools.

Payment annually for twenty years to certain persons.

during the period of twenty years, if they shall live so long, the following sums respectively: To Mrs. Arivella D. Meeker, five hundred dollars; to Miss Josephine Meeker, five hundred dollars; to Mrs. Sophronia Price, five hundred dollars; to Mrs. Maggie Gordon, five hundred dollars; to George Dresser, two hundred dollars; to Mrs. Sarah M. Post, five hundred dollars; to Mrs. Eaton, mother of George Eaton, two hundred dollars; to the parents of Arthur L. Thompson, two hundred dollars; to the father of Fred Shepard, two hundred dollars; to the parents of Wilmer Eskridge, two hundred dollars"; and by adding to the fifth express condition of said agreement after word "reaffirmed", the words following to wit: "This sum, together with the annuity of fifty thousand dollars hereinbefore provided, may, in the discretion of Congress, at the end of twenty-five years, be capitalized, and the principal sum be paid to said Indians per capita in lieu of said annuities": *And provided also,* That three-fourths of the adult male members of said confederated bands shall agree to and sign said agreement, upon presentation of the same to them, in open council, in the manner hereinafter provided: *Provided further,* That nothing in this act contained, or in the agreement herein set forth, or in the amendments herein proposed to said agreement, shall be so construed as to compel any Ute Indian to remove from any lands that he or she claims in severalty. Said agreement is in words and figures as follows, namely:

Agreement further amended.

Proviso.

[21 Stat., 200.]

Proviso.

Agreement.

The chiefs and headmen of the confederate bands of the Utes now present in Washington, hereby promise and agree to procure the surrender, to the United States, for trial and punishment, if found guilty, of those members of their nation, not yet in the custody of the United States, who were implicated in the murder of the United States Indian Agent N.C. Meeker and the murder of and outrages upon the employees

Murder-

ers, etc., to be surrendered for trial and punishment.

at the White River Agency on the twenty-ninth day of September, eighteen hundred and seventy-nine, and in case they do not themselves succeed in apprehending the said parties, presumably guilty of the above-mentioned crime, that they will not in any manner obstruct, but faithfully aid any officers of the United States, directed by the proper authorities, to apprehend such presumably guilty parties.

Amended by Congress.

The said chiefs and headmen of the confederated bands of Utes also agree and promise to use their best endeavors with their people to procure their consent to cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.

Southern Ute to remove and settle upon lands on the La Plata River, Colorado.

The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

Uncompahgre Ute to remove to Grand River, etc.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.

White River Ute to remove to Uintah Reserve.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

Allotments to be made.

Allotments in severalty of said lands shall be made as follows:

How made.

To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section.

To each single person over eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

To each orphan child under eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and to each other person, under eighteen years, now living, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.

Made with the advice of a commission.

All allotments to be made with the advice of the commission (*) hereinafter provided, upon the selection of the Indians, heads of families selecting for their minor children, and the agents making the allotment for each orphan child.

Chiefs and headmen not to interfere with travel, etc.

The said chiefs and headmen of the confederated bands of Utes further promise that they will not obstruct or in anywise interfere with travel upon any of the highways now open or hereafter to be opened by lawful authority in or upon any of the lands to be set apart for their use by virtue of this agreement.

Conditions of agreement.

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

Lands to be surveyed and alloted.
[21 Stat. 201.]

First. That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians in severalty in the proportion hereinbefore mentioned, and to issue patents in fee simple to them respectively therefor, so soon as the necessary laws are passed by Congress.

Patents to issue,
Title acquired.

The title to be acquired by the Indians shall not be

subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President of the United States may see fit to remove the restriction, which shall be incorporated in the patents when issued, and any contract made prior to the removal of such restriction shall be void.

Not subject to alienation or tax.

Second. That so soon as the consent of the several tribes of the Ute Nation shall have been obtained to the provisions of this agreement, the President of the United States shall cause to be distributed among them in cash the sum of sixty thousand dollars of annuities now due and provided for, and so much more as Congress may appropriate for that purpose; and that a commission (a) shall be sent to superintend the removal and settlement of the Utes, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support, and upon such settlement being duly effected, that they are furnished with houses, wagons, agricultural implements, and stock cattle sufficient for their reasonable wants, and also such saw and grist mills as may be necessary to enable them to commence farming operations, and that the money to be appropriated by Congress for that purpose shall be apportioned among the different bands of Utes in the following manner: One-third to those who settle on the La Plata River and vicinity, one-half to those settling on Grand River and vicinity, and one-sixth to those settling on the Uintah Reservation.

Annuity, when distributed.

Commission for removal.

Distribution of appropriation.

One-third to those on La Plata River, one-half to those on Grand River, one-sixth to those on Uintah Reserve.

Perpetual trust fund in consideration of cession of lands.

Third. That in consideration of the cession of territory to be made by the said confederated bands of the Ute Nation, the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, agrees to set apart and hold, as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed per capita to them annually forever.

Removal of agencies of Uncompahgre and Southern Ute.

Schools to be established.

Fourth. That as soon as the President of the United States may deem it necessary or expedient, the agencies for the Uncompahgres and Southern Utes be removed to and established at suitable points, to be hereafter selected, upon the lands to be set apart, and to aid in the support of the said Utes until such time as they shall be able to support themselves, and that in the mean time the United States Government will establish and maintain schools in the settlements of the Utes, and make all necessary provision for the education of their children.

Provisions for perpetual annuity in treaty of Mar. 2, 1868, vol.2, p. 765, and act of 1874, c. 136, ante, p. 151, reaffirmed.

Fifth. All provisions of the treaty of March second, eighteen hundred and sixty-eight, and the act of Congress approved April twenty-ninth, eighteen hundred and seventy-four, not altered by this agreement, shall continue in force, and the following words from article three of said act, namely,"The United States agrees to set apart and hold, as a perpetual trust for the Ute Indians, a sum of money or its equivalent in bonds, which shall be sufficient to produce the sum of twenty-five thousand dollars per annum, which sum of twenty-five thousand dollars per annum shall be disbursed or invested at the discretion of the President, or as he may direct, for the use and benefit of the Ute Indians forever", are hereby expressly reaffirmed.

Sixth. That the commissioners above mentioned shall ascertain what improvements have been made by any member or members of the Ute Nation upon any part of the reservation in Colorado to be ceded to the United States as above, and that payment in cash shall be made to the individuals having made and owning such improvements, upon a fair and liberal valuation of the same by the said commission, taking into consideration the labor bestowed upon the land.

Commissioners to ascertain what improvements have been made by Indians.

Payment therefor.

Done at the city of Washington this sixth day of March anno Domini eighteen hundred and eighty.

[21 Stat., 202.]

Signed

CHAVANAUX his X mark

IGNATIO his X mark

ALHANDRA his X mark

VERATZITZ his X mark

GALOTA his X mark

JOCKNICK his X mark

WASS his X mark

SAWAWICK his X mark

OURAY

Witnesses:

WILL F. BURNS, Interpreter.
W.H. BERRY, Interpreter.

OTTO MEARS, Interpreter.
HENRY PAGE, United States Indian Agent, Southern Utes.
CHARLES ADAMS, Special Agent.

Commissioners appointed, compensation, expenses.

SEC. 2. That the President of the United States be, and he is hereby, authorized and empowered to appoint, by and with the advice and consent of the Senate, five commissioners, who shall receive compensation for their services at the rate of ten dollars per diem while actually engaged, in addition to their actual traveling and other necessary expenses; and said commissioners shall, under such instructions as the Secretary of the Interior may give them, present said agreement to the confederated bands of the Ute Indians in open council for ratification, as provided in the first section of this act; and said commissioners shall have a clerk, at a salary of two hundred dollars per month, in addition to his actual traveling and other necessary expenses, and who shall give bond in an amount to be fixed by the Secretary of the Interior, and shall act also as disbursing-officer for said commissioners. And upon the ratification of said agreement by said tribe as herein provided, said commissioners shall, under the direction of the Secretary of the Interior, appraise the improvements belonging to said Ute Indians upon the lands surrendered by them as provided in said agreement, and report the same to the Secretary of the Interior for settlement. It shall be their duty to take a careful census of said Indians, separating them under said census as follows:

Clerk's salary, bond, duties.

To report.

Census of Indians.

First. Those known in the agreement above referred to as Southern Utes.

Second. Those known as Uncompahgre Utes.

Third. Those known as White River Utes.

Said census shall also show separately the name of each head of a family, and the number of persons in such family, distinguishing those over eighteen years of age from those under eighteen years of age, and giving the names of each separately; also, said census shall show separately the orphan children in each of said classes of Utes described in the foregoing agreement, and they shall make an accurate register of the names, ages, occupations, and general condition of each of the above classes as aforesaid, specifying particularly the number and names of said Indians incapable by reason of orphanage, minority, or other disability of managing their own affairs, and they shall also select lands and allot them in severalty to said Indians, as herein provided, and superintend the removal, location, and settlement of the Indians thereon, and do and perform such other services as the Secretary of the Interior may consider necessary for them to do in the execution of the provisions of this act.

Particulars of census.

(21 Stat., 203.)

Lands allotted in severalty.

And after the said commissioners shall have performed the duties specifically assigned to them by this act, and such other duties as the Secretary of the Interior may require of them, they shall make a full report of their proceedings to the Secretary of the Interior, which shall set forth, among other things, the name of each person to whom they may have apportioned and allotted lands as herein provided for, with the name and condition of such person, showing who, upon proofs, are considered incompetent to take charge of their property, either as orphans, minors, or for other causes; and shall also exhibit the quantity of land assigned to each person, with the metes and bounds of such allotments. And said commissioners shall make an accurate map of the whole survey and proceeding, showing the partition and division aforesaid, a copy of which map shall be filed with said report; and the Secretary of the Interior shall cause

Commissioners to make full report.

Map of survey.

a copy to be filed in the General Land Office, and copies shall also be filed in the office of the surveyors-general of Utah, Colorado and New Mexico, and also in the office of the register and receiver of the land district in which such lands or any portion of them may be situate. Said commissioners shall further report the total number of acres alloted and set apart as provided by the foregoing agreement, the amount of such land tillable without irrigation, the amount of irrigation required, and the probable cost thereof. They shall also locate the agencies for the Southern Utes and the Uncompahgre Utes, shall furnish an estimate of the number of houses required, the cost of each, the number of school-houses required and the number of teachers, and the number of children of school age, and such other data as the secretary of the Interior may require to enable him to make judicious expenditure of the money appropriated in section nine of this act; and said commissioners shall exercise direct supervision and control of all expenditures under this act during the time they remain in the Ute country, under the general direction of the Secretary of the Interior; and they shall render a full and detailed account of such expenditure, with the vouchers therefor, as now provided by law.

Further report of acres allotted.

Agencies located.

Estimate of school-houses and school children.

To supervise and control expenditures and render accounts and vouchers.

SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement above mentioned, and whenever the report and proceedings of said commissioners, as required by this act, are

Survey of land for the settlement in severalty of Indians.

Allotment of land in severalty.

approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions, and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided,* That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: *Provided further,* That the subdivisions upon which are located improvements to be appraised, as provided for in section two of this act, shall be offered to the highest bidder at public sale, after published notice of at least thirty days by the Secretary of the Interior,

Patents issued to allottees.

Lands not allotted, released, and conveyed to United States.

To be held and disposed of as other public lands.

Not subject to homestead entry.

Proceeds of sales, distribution of.

[21 Stat., 204.]

Remainder deposited in Treasury in trust for Indians.

Proviso.

Lands with improvements thereon sold at public sale.

R.S., 1977.

and the same shall be absolutely reserved from occupation or claim until so sold.

Indians subjected to provisions of.

SEC. 4. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every of the said Indians shall be subject to the provisions of section nineteen hundred and seventy-seven of the Revised Statutes and to the laws, both civil and criminal, of the State or Territory in which they may reside, with the right to sue and be sued in the courts thereof: *Provided*, That their lands and personal property shall not be subject to taxation or execution upon the judgment, order, or decree of any court obtained on any cause of action which may arise during the period named in the above recited agreement.

Allotments not subject to tax, etc.

Perpetual trustfund, interest $50,000 paid per capita annually.

SEC. 5. That the Secretary of the Treasury shall, out of any moneys in the Treasury not otherwise appropriated, set apart, and hold as a perpetual trustfund for said Ute Indians, an amount of money sufficient at four per centum to produce annually fifty thousand dollars, which interest shall be paid to them per capita in cash, annually, as provided in said agreement.

Salaries to Ute continued ten years longer than stipulated in treaties.

$4,000 per annum to be distributed by the President.

SEC. 6. That all salaries paid to any member or members of the Ute tribe under existing treaty stipulations shall be continued for the term of ten years beyond the time fixed in said treaties. And the sum of four thousand dollars per annum for the term of ten years shall be distributed by the President at his discretion to such of said Indians as distinguished themselves by good sense, energy, and perseverence in the pursuit of civilized life, and in the promotion of a good understanding between the Indians and the Government and people of the United States, and there is hereby appropriated, out of any moneys in

the Treasury not otherwise appropriated, four thousand dollars as the first installment for such purpose.

R.S., title 28, extended to lands allotted to Indians.

SEC. 7. That the provisions of title twenty-eight of the Revised Statutes shall extend over and be applicable to every allotment of land provided for in the foregoing agreement, and to the adminstration of the affairs of said Indians, so far as said provisions can be made applicable thereto.

SEC. 8. [*Repealed by 1884, ch. 50, post, p. 217.*]

Appropriations.

SEC. 9. That for the purpose of carrying the provisions of this act into effect, the following sums, or so much thereof as may be necessary, be, and they are hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of the Interior as follows, namely:

Expenses of commissioners.

For the payment of the expenses of the commissioners herein provided, the sum of twenty-five thousand dollars.

Removal, etc., Ute.

[21 Stat., 205.]

For the cost of removal and settlement of the Utes, surveying their lands, building houses, establishing schools, building mills and agency buildings, purchasing stock, agricultural implements, and so forth, as provided in said agreement and in this act, the sum of three hundred and fifty thousand dollars.

Per capita to Utes.

For the sum to be paid to said Ute Indians, per capita, in addition to the sixty thousand dollars now due and provided for, the sum of fifteen thousand dollars.

Individual improvements.

For the payment of the appraised value of individual improvements as provided herein, the sum of twenty thousand dollars.

Support of Ute in Colorado current fiscal year.

Proviso.

For the care and support of the Ute Indians in Colorado for the balance of the current fiscal year,

the sum of twelve thousand dollars: *Provided,* That with the exception of the appropriation for expenses of the commissioners, the above appropriations shall become available only upon the ratification of said agreement by three-fourths of the male adult members of the Ute Indians as provided in this act, and the certification of such fact to the Secretary of the Treasury by the Secretary of the Interior.

Time limited for ratification of amended agreement by three-fourths of male adult Utes.

SEC. 10. If the agreement[a] as amended in this act is not ratified by three-fourths of the adult male Indians of the Ute tribes within four months from the approval of this act the same shall cease to be of effect after that day.

Approved June 15, 1880.

4.Executive Order of January 5, 1882, I Kapp. 901 (2d ed. 1904), LD 12:

EXECUTIVE MANSION, *January 5, 1882.*

It is hereby ordered that the following tract of country, in the Territory of Utah, be, and the same is hereby, withheld from sale and set apart as a reservation for the Uncompahgre Utes, viz: Beginning at the southeast corner of township 6 south, range 25 east, Salt Lake meridian; thence west to the southwest corner of township 6 south, range 24 east; thence north along the range line to the northwest corner of said township 6 south, range 24 east; thence west along the first standard parallel south of the Salt Lake base-line to a point where said standard parallel will, when extended, intersect the eastern boundary of the Uintah Indian Reservation as established by C.L. Du Bois, United States deputy surveyor, under his contract dated August 30, 1875; thence along said boundary southeasterly to the Green River; thence down

the west bank of Green River to the point where the southern boundary of said Uintah Reservation, as surveyed by Du Bois, intersects said river; thence northwesterly with the southern boundary of said reservation to the point where the line between ranges 16 and 17 east of Salt Lake meridian will, when surveyed, intersect said southern boundary; thence south between said ranges 16 and 17 east, Salt Lake meridian, to the third standard parallel south; thence east along said third standard parallel to the eastern boundary of Utah Territory; thence north along said boundary to a point due east of the place of beginning; thence due west to the place of beginning.

CHESTER A. ARTHUR

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5. Act of May 24, 1888, ch. 310, 25 Stat. 157, I Kapp. 271 (2d ed. 1904), LD 18:

CHAP. 310.—An act to restore to the public domain a part of the Uintah Valley Indian Reservation, in the Territory of Utah, and for other purposes.[a]

May 24, 1888.
25 Stat., 157.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the Uintah Valley Indian Reservation, in the Territory of Utah, established by proclamation of the President, of date of October third, eighteen hundred and sixty-one, as lies within the following boundary, namely: Beginning at milepost numbered nineteen, Du Bois' survey, from the initial point established in township eight south, range twenty east, Salt Lake meridian; thence southerly to the northeast corner of township two south, range one east, Uintah special meridian; thence south along the east boundary of township two south, range one east, Uintah special meridian, to the south-east corner

Uintah Valley Indian Reservation.
Portion of, restored to public domain.
Boundaries.

of township two south, range one east, Uintah special meridian; thence east along the north boundary of township three south, range two east, Uintah special meridian, to its intersection with the east boundary of the Uintah Indian Reservation, thence in a northwest direction with the eastern boundary line of said reservation to the beginning, be, and the same is hereby, declared to be public lands of the United States and restored to the public domain.

Sale of lands.

SEC. 2. That said lands shall be disposed of at public or private sale in the discretion of the Secretary of the Interior, and upon his order, in quantities not exceeding one quarter of a section to any one purchaser, the non-mineral lands for not less than one dollar and twenty-five cents per acre, and not otherwise than for cash: *Provided,* That any location, entry, or entries, mineral or non-mineral, heretofore made or attempted to be made on said lands, or any part thereof, by any qualified person, shall bear date and be allowed the same as if said lands had been public lands at the time of said attempted location or institution of said proceedings, but said mineral entries shall not be completed except upon the payment of twenty dollars an acre, or at that rate for the amount taken up by the claim: *And provided further,* That all moneys arising from the sales of this land shall belong to said Indians and be paid into the Treasury of the United States and held or added to any trust funds of said tribes now there.

Provisos.
Prior locations, etc.

Proceeds to go to Indians.

Ratification by Indians.

SEC. 3. That the Secretary of the Interior shall submit this act to the adult male Indians on said reservation, and the restoration shall take effect on a ratification by three-fourths thereof, and the Secretary of the Interior shall prescribe rules for ascertaining the wishes of said Indians and to secure their free action touching the proposed disposal of said lands.

Approved, May 24, 1888.

6.Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-338, I Kapp. 520, 546 (2d ed. 1904), LD 35:

SEC. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows:

Uncompahgre Indians, Utah.
Vol. 21 p. 200.

"Allotments in severalty of said lands shall be made as follows: To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided,* That with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location:" *And provided,* That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for

Allotments in severalty.

Provisos.
Special selections.

Payment

allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

Lands not allotted open to entry.

SEC. 21. That the remainder of the lands on said reservation, shall, upon the approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: *Provided,* That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances. *Provided,* That after three years actual and continuous residence upon agricultural lands from date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not commuted at the end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

Provisos.
Mineral claims.
Commutation of agricultural entries.

Uintah Reservation, Utah, negotiation for cession of lands.

SEC. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.

Commissionors' salaries, etc.

SEC. 23. That said commissioners shall receive six dollars per day each and their actual and necessary traveling and incidental expenses while on duty, and to be allowed a clerk, to be selected by them, whose compensation shall be fixed by said commissioners, subject

to the approval of the Secretary of the Interior: *Provided*, That the cost of executing the provisions of this Act shall not exceed the sum of sixteen thousand dollars, which sum is hereby appropriated for that purpose out of any moneys in the Treasury not otherwise appropriated.

Approved, August 15, 1894.

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7. Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, I Kapp. 619, 621 (2d ed. 1904), LD 49:

The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation now theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

Uncompahgre Ute Indians.
Allotment to.

Unallotted lands open for location, etc.
Gilsonite, etc., lands excepted.

And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances is reserved to the United States.

Title to gilsonite, etc., lands.

* * * *

8. Act of June 4, 1898, ch. 376, 30 Stat. 429, I Kapp. 642 (2d ed. 1904), LD 54:

June 4, 1898.

CHAP. 376—An act for the appointment of a commission to make allotments of lands in severalty

to Indians upon the Uintah Indian Reservation in Utah, and to obtain the cession to the United States of all lands within said reservation not so allotted.

30. Stat, 429.

Uintah Indian Reservation, Utah.

Commission to allot lands to Indians.

See note to 1874, c. 136, ante p. 151.

1894, ch. 290, ante p. 546.

Allotments.

See also note, 1888, c. 310, ante, p. 271.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed to appoint a commission consisting of not more than three persons, who shall, with the consent of the Indians properly residing on the Uintah Indian Reservation in Utah, allot in severalty to the said Indians, and to such of the Uncompahgre Indians as may not be able to obtain allotments within the Uncompahgre Indian Reservation, agricultural and grazing lands as follows: To each head of a family, one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided,* That with the consent of said commission any adult Indian may select a less quantity of land, if more desirable on account of location.

Proviso.

Desirable sites.

Surveys.

All necessary surveys to enable said commission to complete the allotments shall be made under the direction of the General Land Office.

Cession to United States of unallotted lands.

SEC. 2. That said commission shall also obtain, by the consent of a majority of the adult male Indians properly residing upon and having an interest in the said Uintah Indian Reservation, the cession to the

United States of all the lands within said reservation not allotted or needed for allotment as aforesaid. The agreement for such cession shall be reported by said commission and become operative when ratified by Act of Congress; and thereupon such ceded lands shall be held in trust by the United States for the purpose of sale to citizens thereof: *Provided,* That the United States shall pay no sum or amount whatever for said lands so ceded. Said lands shall be sold in such manner and in such quantities and for such prices as may be determined by Congress: *Provided,* That the amounts so received shall, in the aggregate be sufficient to pay said Indians in full the amount agreed upon for said lands. All sums received from the sales of said lands shall be placed in the Treasury of the United States for said Indians, and shall be exclusively devoted to the use and benefit of the Indians having interests in the lands so ceded.

—ratification, etc.

Provisos. Payment Sale.

Aggregate amount from sales etc.

SEC. 3. That said commissioners shall receive six dollars per day each, and their actual and necessary traveling and incidental expenses while on duty, and to be allowed a clerk to be selected by them, whose compensation shall be fixed by said commissioners, subject to the approval of the Secretary of the Interior: *Provided,* That the cost of executing the provisions of this Act shall not exceed the sum of five thousand dollars, which sum is hereby appropriated for that purpose, out of any moneys in the Treasury not otherwise appropriated.

Pay o commissioners. —clerk.

Proviso. Limit fo expenses, etc.

Approved, June 4, 1898.

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9. Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264, I Kapp. 750, 753 (2d ed. 1904), LD 82:

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of

Uintah and White River Utes.

Allotment of irrigable land.
Post, pp. 744, 997.

the Uintah and the White River tribes of Ute Indians, be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys

Unallotted lands restored to public domain.
Provisos.
Homestead entries.
Mineral leases.

Raven Mining Company.

Application of proceeds from sales.

Post, p. 745.

in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

Payments t
Indians.
Vol. 3
p. 87.
Post, p
744.

* * * *

10. Joint Resolution of June 19, 1902, No. 31, 32 Stat. 744, I Kapp. 799-800 (2d ed. 1904), LD 85:

[No. 31.] Joint Resolution Supplementing and modifying certain provisions of the Indian appropriation Act for the year ending June thirtieth, nineteen hundred and three.

June 1
1902.
[Pub.
Res., N
31.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act "Making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other

Indian
appropria
tion act.
Correc-
tions.

purposes," are hereby supplemented and modified as follows:

Spokane Indian Reservation, Wash.

The Secretary of the Interior is directed to make allotments in severalty to the Indians of the Spokane Indian Reservation in the State of Washington, and upon the completion of such allotments the President shall by proclamation give public notice thereof, whereupon the lands in said reservation not allotted to Indians or used or reserved by the Government, or occupied for school purposes, shall be opened to exploration, location, occupation, and purchase under the mining laws.

Land not allotted open to purchase, etc.

Ante, p. 266.

Walker River Indian Reservation.

Nonirrigable grazing lands.

Ante, p. 260.

In addition to the allotment in severalty of lands in the Walker River Indian Reservation in the State of Nevada, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

Uintah and White River Utes.

Nonirrigable grazing lands.

Ante, p. 263.

Post, p. 997.

In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

Uncompahgre Indians.

Allotments confirmed to agricultural lands.

All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to

each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.

Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

Approved, June 19, 1902.

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11. Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-998, III Kapp. 14, 17-18 (1913), LD 91:

To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the pur-

pose of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: *Provided, however,* That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: *And provided further,* That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further,* That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.

32 Stat., 998.

Proviso.
Obtaining consent to allotment.
1904, ch. 1403, 33 Stat., 207, post, p. 53.

Grazing lands.
Restriction.
1905, ch. 1479, 33 Stat., 1069, post, p. 146.

Unallotted lands.
Time of opening in settlement extended.
32 Stat., 251, vol. 1, p. 732.

ans, Nev.
Uintah and Whi River Ute Utah.
Survey, etc., of i rigable lands.
32 Stat 260, 742.
Vol 1, 751, 799.

BEST AVAIL

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location, and entry by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the county recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah County, Utah, within ninety days after the passage of this act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed

Uncompahgre India Reservation.

Mining claims locate on, prior t January 1891, valid.

30 Stat 87, vol. 1, p 621.

Patents to issue on re locations, etc of claims.

Claims located afte January 1891, invalid.

Sale o remainder o mineral lands

Restrictions.

ABLE COPY

in a proclamation of the President of the United States issued for that purpose not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

Balance of lands reserved.

* * * *

12.Act of April 21, 1904, Ch. 1402, 33 Stat. 189, 207-208, III Kapp. 35, 53 (1913), LD 94:

That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby, extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

Uintah Reservation, Utah.

Time of opening unallotted lands extended.

1902, ch. 888, 32 Stat., 263, vol. 1, p. 753.

1903, ch. 994, 32 Stat., 998, ante, p. 18.

1905, ch. 1479, 33 Stat., 1069, post, p. 146.

33 Stat., 208.

* * * *

13.Act of March 3, 1905, ch. 1479, 33 Stat, 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105:

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands

Uintah Reservation Utah.

to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

Restriction on grazing lands repealed.
1902, J.R. 31, 32 Stat., 744, vol. 1, p. 799.

That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act

1903, ch. 994, 32 Stat., 998, ante, p. 17.

Unallotted lands.
Time extended for opening, to entry.
1904, ch. 1402, 33 Stat., 207, ante, p. 53.
1902, ch. 888, 32 Stat., 263, vol. 1, p. 753.

Provisos.
Soldiers' and sailors' rights.
R. S. secs. 2304, 2305.
33 Stat., 1070.

of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

Sale of remaining lands.

Proceeds of sale.

1902 ch. 888, 32 Stat., 263, vol. 1, p. 753.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.[1]

Uintah Forest Reserve.

Additional land reserved.

32 Stat., 263.

Reservoir site.

Proviso.

Proceeds of timber sales.

That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in

Raven Mining Co.

Certificate of location of claims, etc.

the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further*, That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: *And provided further*, That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall

1902, ch
888, supra

Patent
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Provisos
Florence
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etc.

have the right of ingress and egress to and from their respective properties over and through said reservation.

* * * *

14.Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602 (1913), LD 107:

July 14, 1905. Proclamations, 34 Stat., Part 3, 3116.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Uintah Forest Reserve, Utah. Preamble. 29 Stat., 895. 26 Stat., 1103. Proclamations, 34 Stat., pp. 200-201.

WHEREAS, the Uintah Forest Reserve, in the State of Utah, was established by proclamation dated February twenty-second, eighteen hundred and ninety-seven, under and by virtue of section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber-culture laws, and for other purposes", which provides, "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

33 Stat., Part I, 1070.

And whereas, it is provided by the Act of Congress, approved March third, nineteen hundred and five, entitled, "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," that "before the opening of the Uintah Indian Reservation the President is hereby authorized to set

apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary";

And whereas, it is considered necessary for the public good that certain lands in the Uintah Indian Reservation be set apart and reserved as an addition to the Uintah Forest Reserve;

Now, therefore, I, Theodore Roosevelt. President of the United States, by virtue of the power in me vested by the aforesaid act of Congress, approved March third, nineteen hundred and five, do hereby make known and proclaim that certain lands in the said Uintah Indian Reservation are hereby added to and made a part of the Uintah Forest Reserve, and that the boundary lines of the said forest reserve are, accordingly, so changed and extended as to read as follows:

Lands added to forest reserve from Uintah Indian Reservation.

Beginning at the north-west corner of Township one (1) South, Range seven (7) East, Salt Lake Meridian, Utah; thence easterly along the Base Line to the south-west corner of Township one (1) North, Range nine (9) East; thence northerly to the north-west corner of said township; thence easterly to the south-west corner of Township two (2) North, Range fourteen (14) East; thence northerly to the north-west corner of said township; thence easterly to the middle of the channel of the Green River; thence in a general south-easterly direction along the middle of the channel of said river to the range line between Ranges twenty-two (22) and twenty-three (23) East; thence southerly along the range line, allowing for the proper offset on the Base Line, to the south-east corner of

Description.

Township two (2) South, Range twenty-two (22) East; thence westerly to the north-west corner of Township three (3) South, Range nineteen (19) East; thence southerly to the eastern boundary of the Uintah Indian Reservation; thence north-westerly along said Indian reservation boundary to the section line between Sections twenty-one (21) and twenty-eight (28), Township two (2) North, Range one (1) East, Uintah Meridian; thence westerly to the south-west corner of Section nineteen (19), Township two (2) North, Range one (1) West; thence northerly to the south-east corner of Section thirteen (13), Township two (2) North, Range two (2) West; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of Section twelve (12), said township; thence westerly to the south-west corner of Section four (4), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section four (4), Township two (2) North, Range three (3) West; thence southerly to the south-east corner of Section thirty-three (33), said township thence westerly to the north-east corner of Township one (1) North, Range six (6) West; thence southerly to the south-east corner of Section thirteen (13) said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said section; thence westerly to the south-west corner of Section eleven (11), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section eight (8), said township; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the north-east corner of Section twenty-one (21), Township one (1) North, Range nine (9) West; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section nineteen (19), said town-

Uintah Forest Reserve—Continued.

ship; thence southerly along the range line, allowing for the proper offset on the Base Line, to the north-west corner of Section eighteen (18), Township one (1) South, Range nine (9) West; thence easterly to the north-east corner of Section sixteen (16), Township one (1), South, Range eight (8) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence westerly to the north-east corner of Section four (4), Township two (2) South, Range ten (10) West; thence southerly to the south-east corner of Section sixteen (16), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Township two (2) South, Range eleven (11) West; thence westerly to the south-west corner of Section thirty-three (33), said township; thence northerly to the south-east corner of Section twenty (20), said township; thence westerly to the south-west corner of said section; thence northerly to the south-east corner of Section seven (7), said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said township; thence westerly to the north-east corner of fractional Section four (4), Township two (2) South, Range twelve (12) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence easterly to the north-east corner of Section three (3), Township three (3) South, Range twelve (12) West; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section eleven (11), said township; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section thirteen (13), said township; thence southerly to the south-east corner of Township four (4) South, Range twelve (12) West; thence easterly to the south-west corner of Section thirty-three (33), Township four (4) South, Range

eleven (11) West; thence northerly to the north-west corner of said section; thence easterly to the south-west corner of Section twenty-five (25), said township; thence northerly to the north-west corner of said section; thence easterly to the north-east corner of Section thirty (30), Township four (4) South, Range ten (10) West; thence southerly to the south-east corner of Section thirty-one (31), said township; thence easterly to the southwest corner of Township four (4) South, Range nine (9) West; thence northerly to the north-west corner of Section thirty (30), said township; thence easterly to the north-east corner of Section twenty-five (25), said township; thence southerly to the south-east corner of said township; thence easterly to the north-east corner of Section five (5), Township five (5) South, Range eight (8) West; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Section twenty-four (24), Township five (5) South, Range nine (9) West; thence westerly to the north-east corner of Section twenty-eight (28), said township; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section twenty-nine (29), said township; thence southerly to the north-west corner of Section twenty-nine (29), Township six (6) South, Range nine (9) West; thence easterly to the south-west corner of Section twenty-one (21), Township six (6) South, Range eight (8) West; thence northerly to the north-west corner of Section four (4), said township; thence easterly to the eastern boundary of the Uintah Indian Reservation; thence in a general south-westerly and north-westerly direction along said Indian reservation boundary to the range line between Ranges six (6) and seven (7) East, Salt Lake Meridian; thence northerly to the north-west corner of Township

one (1) South, Range seven (7) East, the place of beginning; such of the above-named corners as have not been established by the official surveys being intended to be located at the points where such corners would fall in projecting the surveys in the directions indicated without allowing for any irregularities which may occur in actually extending the surveys;

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided,* that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made.

Lands excepted.

Warning is hereby expressly given to all persons not to make settlement upon the lands reserved by this proclamation.

Reserve from settl ment.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[SEALEI

By the President: THEODORE ROOSEVELT

ALVEY A. ADEE

Acting Secretary of State.

15.Presidential Proclamation of July 14, 1905, 34 Stat., 3119, III Kapp. 605 (1913), LD 108:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.
A PROCLAMATION.

July 14, 1905.
Proclamations.
34 Stat., Part 3, 3119.
Uintah Indian Reservation, Utah.
Preamble.
32 Stat., 263.

Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre".

32 Stat., 998.
33 Stat., 207.
33 Stat., 1069.

And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:

That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the Act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in

which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: Provided, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish war or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States; and it is further directed and prescribed that:

Unallotted lands on reservation opened to entry, etc., Aug. 28, 1905.

Commencing at 9 o'clock a.m. Tuesday, August 1, 1905, and ending at 6 o'clock p.m. Saturday, August 12, 1905, a registration will be had at Vernal, Price and Provo, State of Utah, and at Grand Junction, State of Colorado, for the purpose as ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to

Places of registration.

Applications.

show himself duly qualified, by written application to be made only on a blank form provided by the Commissioner of the General Land Office, to make homestead entry of these lands under existing laws, and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the Government against any attempted impersonation. Registration cannot be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of Congress, approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney on a blank form provided by the Commissioner of the General Land Office, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name.

R.S., sec. 2304, p. 422.
31 Stat., 847.

Certificate of registration.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he may make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands and then only in pursuance of a homestead entry duly allowed

Restrictions.

by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Provo, Utah, commencing at 9 o'clock a.m., Thursday, August 17, 1905, and continuing for such period as may be necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed, all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified by

Drawings.

the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number, and of the day upon which he must make his entry, by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to the press to be published as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing.

Applications.

Commencing on Monday, August 28, 1905, at 9 o'clock a.m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

Certificates registration.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, together with the regular land office fees, but an honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration.

Payments.

Persons who make homestead entry for any of these lands will be required to pay therefor at the rate of one dollar and twenty-five cents per acre when they make final proof, but no payment, other than the usual fees and commissions will be required at the time the entry is made.

Nonmineral affidavits.

Persons who apply to make entry of these lands prior to October 27, 1905, will not be required to file the usual nonmineral affidavit with their applications to enter, but such affidavit must be filed before final proof is accepted under their entries; but all persons who make entry after that date will be required to file that affidavit with their applications to enter.

Entries

The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appears that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Townsites.

Any person or persons desiring to found, or to suggest establishing, a townsite upon any of the said lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for disposal under the townsite laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are needed for townsite purposes they may be released from such withdrawal and then disposed of under the general provisions of the homestead laws in the manner prescribed herein.

Entry of undisposed-of lands.

All persons are especially admonished that under the said act of Congress approved March 3, 1905, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, as hereinbefore prescribed, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in

like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

Regulations.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the city of Washington this 14th July, in the year of our Lord 1905, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] THEODORE ROOSEVELT

BY THE PRESIDENT:

ALVEY A. ADEE

Acting Secretary of State.

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16. Presidential Proclamation of July 31, 1905, 34 Stat., pt. 3, 3139, III Kapp. 609 (1913), LD 110:

BY THE PRESIDENT OF THE UNITED STATES. A PROCLAMATION

July 1905.

Proclamations.

34 Stat. Part 3139.

Uintah Indian Reservation, Utah.

Preamble.

Whereas, on June 7, 1905, the Secretary of the Interior directed the Commissioner of Indian Affairs to cause to be selected, by the Uintah Allotment Commission, one or more tracts of land, suitable for townsite purposes, in the Uintah Indian Reservation Lands, State of Utah, to the end that the same might be reserved

under the provisions of section 2380 of the Revised Statutes of the United States;

R. S., sec. 2380, p. 436.

And whereas, on July 6, 1905, the Acting Commissioner of Indian Affairs reported that said commission had selected, as suitable for townsite purposes and as natural and prospective centers of population, certain described lands which he recommended be reserved under the provisions of said section 2380;

And whereas, on July 7, and 27, 1905, the Department of the Interior approved said selection and recommendation so far as it related to the following described lands in the Uintah land district, Utah, and has requested that they be reserved for townsites to be created under existing statute, to-wit:

Lands designated for townsites.

Lots four, six, and seven, the southwest quarter of the northeast quarter, the south half of the northwest quarter, the southwest quarter, and the west half of the southeast quarter of section twenty-five, lot two, the southeast quarter of the northeast quarter, and the east half of the southeast quarter of section twenty-six, in township three south of range two west of the Uintah special meridian;

Also the southwest quarter of the southeast quarter of section thirty-six, in township three south of range five west, the north half, and the north half of the south half of section one, the east half of the northeast quarter, and the northeast quarter of the southeast quarter of section two, in township four south of range five west of the Uintah special meridian.

And also the south half of the northeast quarter, the southeast quarter, and the southeast quarter of the southwest quarter of section seven, and the northeast quarter of the northwest quarter of section eighteen, in

township three south of range two east of the Uintah special meridian;

Now therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power in me vested by sections 2380 and 2381 of the Revised Statutes of the United States, do hereby declare and make known that said lands are hereby reserved as townsites, to be disposed of by the United States under the terms of the statutes applicable thereto.

Town-sites reserved. R. S. secs. 2380, 2381, 436.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 31st day of July in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] T. ROOSEVELT

By the President:

ALVEY A. ADEE

Acting Secretary of State.

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17. Presidential Proclamation of August 2, 1905, 34 Stat., pt. 3, 3140, III Kapp. 610 (1913), LD 111:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.
A PROCLAMATION.

Aug. 2, 1905. Proclamations. 34 Stat. Part 3, 3140. Uintah Indian Reservation, Utah. Preamble.

WHEREAS, it was declared in my proclamation of July 14, in the year of our Lord 1905, prescribing the manner in which certain lands within the Uintah Indian Reservation should be opened to settlement and entry under the homestead and townsite laws of the United States, among other things as follows:

Commencing on Monday, August 28, 1905, at 9 o'clock a.m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

And, whereas, there now appear to be ample reasons for a modification of said provision;

Modifying provisions for drawings.

Now therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said act of Congress, and for the purpose of modifying the provision of said proclamation above quoted, do hereby declare and direct that said provision be modified to read as follows:

Commencing on Monday, August 28, 1905, at 9 o'clock a.m., the applications of those drawing numbers 1 to 111, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 112 to 222, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that

rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 2d day of August, in the year of our Lord 1905, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] T. ROOSEVELT

By the President:

ALVEY A. ADEE

Acting Secretary of State.

18.Presidential Proclamation of August 3, 1905, 34 Stat., pt. 3, 3141, III Kapp. 610 (1913), LD 112:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Aug. 1905. Proclamations. 34 Stat. Part 3141.

WHEREAS, it is provided by the act of Congress approved March 3, 1905, entitled, "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipu-

Uintah Indian Reservation Utah. Preamble. 33 Stat. Part 1070.

lations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes", that "Before the opening of the Uintah Indian Reservation, the President is hereby authorized to set apart and reserve any reservoir site or other lands necessary to conserve the water supply for the Indians or for general agricultural development, and may confirm such rights and water thereon as have already accrued";

Lands reserved for Indians.

And whereas, it is considered necessary to serve the purposes of the act referred to that certain lands in the Uintah Indian Reservation be withdrawn for the purposes indicated;

Now therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power in me vested by the aforesaid act of Congress, approved March third, nineteen hundred and five, do hereby make known and proclaim that certain lands in the Uintah Indian Reservation are hereby withdrawn from disposal, for reservoir site necessary to conserve the water supply for the Indians, or for general agricultural development, the following described lands:

Agricultural lands.

AGRICULTURAL:

All Sections thirty-two (32), thirty-three (33) and thirty-four (34) Township one (1) South, Range five (5) West; all Sections two (2), three (3), four (4), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), south half of Section sixteen (16), south-west quarter of Section seventeen (17), and all Sections eighteen (18) to thirty-six (36) inclusive, Township two (2) South, Range one (1) West; south half of north-east quarter, south half of north-west quarter, south-west quarter and south-east quarter of Section twenty-five (25), south half of north-east quarter, south half of north-west quarter, south-west quarter and south-east quarter of Section twenty-six (26), north-east quarter, north-west quarter,

north half of south-west quarter and north half of south-east quarter of Section thirty-five (35), and all of Section thirty-six (36), Township two (2) South, Range three (3) West; all Sections three (3) to eleven (11), inclusive, all Sections fourteen (14) to thirty-two (32), inclusive, and west half of Section thirty-three (33), Township two (2) South, Range four (4) West; all Sections one (1), two (2), three (3), four (4); nine (9), ten (10), eleven (11), and north half of Section sixteen (16), township two (2) South, Range five (5) West; south half of north-east quarter, north-west quarter, south-east quarter, south-west quarter of Section three (3), all Section four (4), five (5), six (6), seven (7), eight (8), and west half of Section nine (9), Township three (3) South, Range one (1) West; all Sections one (1), two (2), three (3), four (4) and five (5), east half of northeast quarter, south half of south-east quarter, and south-west quarter of Section six (6), north half of Section seven (7), north half of Section eight (8), all Sections nine (9), ten (10), eleven (11) and twelve (12), Township three (3) South, Range two (2) West; south half of section one (1) and all Section eighteen (18), Township three (3) South, Range three (3) West; all Sections three (3), four (4) five (5), six (6), seven (7), eight (8), nine (9), ten (10), Sections thirteen (13) to twenty-three (23), inclusive, Township three (3) South, Range four (4) West; west half of north-east quarter, north-west quarter, west half of south-east quarter, south-west quarter of Section seventeen (17), and all Sections eighteen (18) and nineteen (19), Township two (2) South, Range one (1) East; south-east quarter, south half of south-west quarter of Section twenty-three (23), south-east quarter and south half of south-west quarter of Section twenty-four (24), and all Sections twenty-five (25), twenty-six (26) and thirty-six (36), Township three (3) South, Range one (1) East; all Sections twenty-nine (29), thirty-one (31) and thirty-two (32), south half of Section thirty (30) and west half of

Section thirty-three (33), Township three (3) South, Range two (2) East; all Sections four (4), five (5) and nine (9), west half of Section ten (10), all Section fifteen (15), east half of Section sixteen (16), north half of Section twenty-two (22), north-west quarter, south-west quarter and south-east quarter of Section twenty-three (23), north-west quarter of Section twenty-five (25) and north-east quarter of Section twenty-six (26), Township four (4) South, Range two (2) east; all Sections twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), South half of Section twenty-nine (29), south half of Section thirty (30), and all Sections thirty-one (31) to thirty-six (36), inclusive, Township two (2) South, Range two (2) West; all Uintah Special Meridian.

Reservoir site.

RESERVOIR.

All Section eighteen (18), Township two (2) North, Range five (5) West; west half of north-west quarter, and north-west quarter of south-west quarter of Section six (6), east half of Section twelve (12), north-east quarter of Section thirteen (13), Township two (2) North, range six (6) West; east half of Section one (1), Township two (2) North, Range seven (7) West; south-west quarter of Section thirty-one (31), township three (3) North, Range six (6) West; all of Township two (2) South, Range eleven (11) West; all of Township three (3) South, Range eleven (11) West; all of Township four (4) South, Range eleven (11) West; all of Township two (2) South, Range twelve (12) West; all of Township three (3) South, Range twelve (12) West; all of Township four (4) South, Range twelve (12) West; north-east quarter, east half of north-west quarter, east half of south-west quarter, north half of south-east quarter and south-east quarter of south-east quarter of Section twenty-one (21), Lots three (3) and four (4), Section twenty-two (22), Lots one (1) and two (2) of Section twenty-seven (27), east half of north-east quarter, south-west quarter of north-east quarter, and east half of north-west quarter of Section twenty-eight

(28), Township two (2) South, Range one (1) East; all Uintah Special Meridian.

Warning is expressly given to all persons not to make settlement upon the lands reserved by this Proclamation.

Reserved from settlement.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 3d day of August in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] THEODORE ROOSEVELT

By the President:

ALVEY A. ADEE

Acting Secretary of State.

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19. Presidential Proclamation of August 14, 1905, 34 Stat., pt. 3, 3142, III Kapp. 612 (1913), LD 113:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA,

A PROCLAMATION.

Aug. 14, 1905.

Proclamations.

34 Stat., Part 3, 3142.

Uintah Indian Reservation, Utah.

Preamble.

WHEREAS, it is believed that the following described lands, to-wit:

Lands designated for townsites.

Lots three, five, and eight, of section twenty-five, and lot one of section twenty-six, in township three south,

of range two west of the Uintah special meridian; and also the southwest quarter of southwest quarter of section nineteen, the northwest quarter of section twenty-nine, and the north half of section thirty, in township three south, of range one west of the Uintah special meridian, in the State of Utah, situate adjacent to other lands in said reservation which were reserved by my proclamation of July 31, in the year of our Lord 1905, are natural and prospective centers of population:

34 Stat., 153.

Additional townsites reserved.

33 Stat., 1069.

R. S. secs. 2380, 2381, p. 436.

34 Stat., 153.

Now therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by the act of Congress, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling the treaty stipulations with various Indian tribes for the fiscal year ending June thirty, nineteen hundred and six, and for other purposes," approved March 3, 1905, and by sections 2380 and 2381 of the Revised Statutes of the United States, do hereby declare and make known that the lands above described are hereby reserved as townsites, to be disposed of by the United States under the terms of the Statutes applicable thereto, in connection with other lands reserved for that purpose by my said proclamation of July 31, 1905.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this fourteenth day of August, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] T. ROOSEVELT

By the President:

ALVEY A. ADEE

Acting Secretary of State.

20.Presidential Proclamation of August 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 613 (1913), LD 114:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Aug. 14, 1905.
Proclamations
34 Stat., Part 3, 3143.

WHEREAS, it has been determined that only that portion of the lands reserved by my proclamation of August 3, 1905, hereinafter described, situated in the Uintah Indian Reservation, in the State of Utah, is required for reservoir sites and to conserve and protect the water supply for the purposes specified in the act of Congress approved March 3, 1905 (33 Stat., 1070), to-wit:

Uintah Indian Reservation, Utah.
Preamble.
34 Stat., 156.
33 Stat., 1070.
Reservoir site reduced.

All of sections eighteen (18), nineteen (19), twenty-nine (29), thirty (30), thirty-one (31), and thirty-two (32), in Township two (2) South, Range eleven (11) West; all of Township three (3) South, Range eleven (11) West; all of sections one (1), to and including section twenty-four (24), and all of sections twenty-six to and including section thirty-two (32), in Township four (4) South, Range eleven (11) West; all of sections one (1), two (2), three (3), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26),

Lands withdrawn from reservoir site restored to former status.

twenty-seven (27), thirty-four (34), thirty-five (35), and thirty-six (36), in Township two (2) South, Range twelve (12) West; and all of sections one (1), two (2), and twelve (12), in Township three (3) South, Range twelve (12) West; all in Uintah Special Meridian.

Now therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said act, do hereby make known and proclaim that all lands embraced in my said proclamation of August 3, 1905, saving and excepting those hereinbefore described, are hereby excluded and withdrawn from the effects of said proclamation and are hereby restored to the status they occupied prior to their reservation for said purposes.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this fourteenth day of August, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] T. ROOSEVELT

By the President:

ALVEY A. ADEE

Acting Secretary of State.

21.Act of April 4, 1910, ch. 140, 36 Stat. 269, 285, III Kapp. 429, 445 (1913), LD 139:

Uintah Indians. Payment

That the Secretary of the Interior is hereby authorized to pay from the reclamation fund for the benefit of the Uintah Indians the sum of one dollar and twenty-

five cents per acre for the lands in the former Uintah Indian Reservation, in the State of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the act approved March third, nineteen hundred and five, chapter fourteen hundred and seventy-nine, and which were by the Secretary of the Interior withdrawn for irrigation works under the provisions of the reclamation act of June seventeenth, nineteen hundred and two, in connection with the reservoir for the Strawberry Valley project. Such payment shall be made in five annual installments, and the moneys paid shall be subject to the same disposition as the proceeds of the sales of lands in the former Indian reservation. All such payments shall be included in the cost of construction of said Strawberry Valley project to be reimbursed by the owners of lands irrigated therefrom, all receipts from said lands, as rentals or otherwise, being credited to the said owners. All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title, management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the reclamation act.

32 Stat., 388.

Installments.

Reimbursement.

* * * *

22.Act of March 11, 1948, P.L. 80-440, 62 Stat. 72, VI Kapp. 375 (1979), LD 187:

[CHAPTER 108]

AN ACT

To define the exterior boundary of the Uintah and Ouray Indian Reservation in the State of Utah, and for other purposes.

March 11, 1948
[S. 1698]
[Public Law 440]
62 Stat. 72.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

AILABLE COPY

Uintah and Ouray Reservation, Utah. Exterior boundary.

assembled, That the exterior boundary of the Uintah and Ouray Reservation in Grand and Uintah Counties, in the State of Utah, for the benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation, is hereby extended to include the following area:

Beginning at the northwest corner of section 18, township 9 south, range 20 east, Salt Lake meridian, and running thence west to Green River;

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Thence northeasterly up Green River approximately thirteen miles to a point where said river intersects the north line of section 11, township 8 south, range 20 east;

Thence east along said section line seven miles to the northeast corner of section 12, township 8 south, range 21 east, Salt Lake meridian;

Thence south along section line two miles to the northeast corner of section 24, township 8 south, range 21 east, Salt Lake meridian;

Thence east one mile to the northeast corner of section 19, township 8 south, range 22 east; thence south one mile to the southeast corner of said section 19; thence east two miles to the northeast corner of section 28;

Thence south six miles to the southeast corner of section 21, township 9 south, range 22 east, Salt Lake meridian;

Thence west eleven miles to the northeast corner of section 27, township 9 south, range 20 east, Salt Lake meridian;

Thence south eight miles to the southeast corner of section 34, township 10 south, range 20 east;

Thence west one and one-half miles to the south quarter corner of section 33;

Thence north one-half mile to the center of said section 33;

Thence east one-fourth of a mile to the southwest corner of the southeast quarter northeast quarter, said section 33;

Thence north one mile to the southeast corner of the southwest quarter northeast quarter, section 28;

Thence west one-quarter of a mile to the center of said section 28;

Thence south one-fourth of a mile to the southeast corner of the northeast quarter southwest quarter, said section 28;

Thence west one-fourth of a mile to the north rim of Big Pack Mountain;

Thence southwesterly along said rim approximately one and one-half miles to the north quarter corner of section 4, township 11 south, range 20 east;

Thence south three-fourths of a mile to the southeast corner of the northeast quarter southwest quarter, said section 4;

Thence west one-fourth of a mile to the northeast corner of the southwest quarter southwest quarter, said section 4;

Thence south one-half mile to the southeast corner of the northwest quarter northwest quarter, section 9;

Thence west one-half mile to the southwest corner of the northeast quarter northeast quarter, section 8;

Thence south three-fourths of a mile to the southeast corner of the southwest quarter southeast quarter, said section 8;

Thence west three-fourths of a mile to the northeast corner of section 18;

Thence south along section line to the southeast corner of said section 18;

Thence southerly along the west rim of Big Pack Mountain approximately three and three-fourths miles to the northeast corner of the southeast quarter southeast quarter, section 1, township 12 south, range 19 east, Salt Lake meridian;

Thence south along the township line five and one-fourth miles to the southeast corner of township 12 south, range 19 east;

Thence following the north and east boundary of Indian Allotment Numbered 353 Uncompahgre on Hill Creek to the southeast corner of said allotment;

Thence along the east line of township 13 south, range 19 east, approximately one and one-half miles to the north rim of East Squaw Canyon;

Thence southeasterly along said rim and up said canyon approximately three and three-fourths miles to the northeast corner of section 33, township 13 south, range 20 east;

Thence south along the section line 6 miles to the northeast corner of section 33, township 14 south, range 20 east;

Thence along the north rim of Flat Rock Mesa approximately six miles to the west quarter corner of section 24;

Thence easterly along the north rim of Ute Canyon approximately two miles to the north quarter corner of section 19, township 14 south, range 21 east, Salt Lake meridian;

Thence continuing along the north rim of said canyon approximately three miles to the center of section 21;

Thence south one mile to the center of section 28;

Thence west one-half mile to the west line of said section;

Thence south one and one-half miles to the southeast corner of section 32;

Thence west along the south line of said township two miles to the southwest corner of township 14 south, range 21 east;

Thence south six miles along the east line of township 15 south, range 20 east, to the southeast corner of said township;

Thence east one-half mile to the center of the north line of section 33, township 15 1/2 south, range 21 east, Salt Lake meridian;

Thence south approximately one and one-half miles to the south quarter corner section 4, township 16 south, range 21 east, Salt Lake meridian;

Thence west one-half mile to the southwest corner of said section 4;

Thence north one-fourth of a mile to the southeast corner of the northeast quarter southeast quarter, section 5;

Thence west one-half mile to the northeast corner of the southeast quarter southwest quarter, said section 5;

Thence south two and one-fourth miles to the south quarter corner of section 17;

Thence west one-half mile to the northeast corner of section 19;

Thence south one-half mile to the east quarter corner of said section 19;

Thence west one-half mile to the center of said section 19;

Thence south two and one-half miles to the south quarter corner of section 31;

Thence west one-half mile to the southwest corner of said township 16 south, range 21 east;

Thence south one and one-half miles to the east quarter corner of section 12, township 17 south, range 20 east, Salt Lake meridian;

Thence west one mile to the east quarter corner of section 11;

Thence south one-half mile to the southeast corner of said section 11;

Thence west one-half mile to the south quarter corner of said section 11;

Thence south one mile to the south quarter corner of section 14;

Thence west one-half mile to the southwest corner of said section 14;

Thence south one mile to the southeast corner of section 22;

Thence west one mile to the southwest corner of section 22;

Thence south approximately one and one-half miles to a point where the section line intersects the ridge between Supply Canyon and West Willow Creek;

Thence southwesterly along said ridge approximately two and one-half miles to the south quarter corner of section 8, township 18 south, range 20 east;

Thence south to the center of section 17;

Thence east one-half mile to the east quarter corner of said section 17;

hence south to the southeast corner of said section 17;

Thence east approximately one-third of a mile to the top of the ridge between Clear Creek and West Willow Creek;

Thence southerly along the top of said ridge approximately three miles to the center of section 33;

Thence south one-half mile to the south quarter corner of said section 33;

Thence east one-fourth of a mile;

Thence south two miles to the southeast corner of the southwest quarter southeast quarter, section 9, township 19 south, range 20 east, Salt Lake meridian;

Thence east one-fourth of a mile to the northeast corner of section 16;

Thence south one mile to the southeast corner of said section 16;

Thence west three miles to the southwest corner of section 18;

Thence north 2 and three-fourths miles;

Thence west one-fourth of a mile;

Thence north one-fourth of a mile to the southwest corner of the southeast quarter southeast quarter, section 36, township 18 south, range 19 east;

Thence west three-fourths of a mile to the southwest corner of said section 36;

Thence northwesterly along the watershed divide of Book Cliff Mountains approximately twelve and one-half miles to the east quarter corner of section 6, township 18 south, range 19 east;

Thence southwesterly down Coal Creek Canyon approximately thirteen miles to Green River at a point

approximately one-fourth of a mile west of the southeast corner of section 18, township 18 south, range 17 east, Salt Lake meridian;

Thence northerly up Green River to a point two and one-half miles north eighty degrees west from the southwest corner of section 7, township 12 south, range 19 east, Salt Lake meridian;

Thence southwesterly along the east rim of Main Tabyago Canyon approximately three and one-half miles;

Thence south five-eighths of a mile to the rim of the ridge;

Thence southwesterly across West Tabyago Canyon approximately one-half mile to the ridge;

Thence southwesterly along the north rim of the ridge approximately two and one-fourth miles to Rock House Canyon;

Thence southwesterly across Rock House Canyon approximately three-fourths of a mile to the top of knoll in Rock House Canyon;

Thence southeasterly along the south rim of Rock House Canyon approximately two and three-fourths miles to a point approximately one mile north of Gray Knoll;

Thence south one-half mile across bench to north rim of Big Canyon; thence southeasterly along the north rim of Big Canyon approximately two miles to the head of draw approximately one mile east of Gray Knoll;

Thence southeasterly one-fourth of a mile across bench to the north rim of Big Canyon Flat;

Thence southeasterly along north rim of Big Canyon Flat approximately three and one-fourth miles;

Thence east approximately one-fourth of a mile across bench to the north rim of Big Canyon Flat;

Thence southeasterly along the north rim of Big Canyon Flat approximately one mile;

Thence east approximately one-fourth of a mile across bench to north rim of Big Canyon Flat;

Thence southeasterly along the north rim of Big Canyon Flat approximately two and one-half miles;

Thence east approximately one-fourth of a mile across bench;

Thence southeasterly along the north rim of Big Canyon Flat approximately one and three-fourth miles;

Thence east to northwest corner of section 31, township 13 south, range 19 east, Salt Lake meridian;

Thence east one mile;

Thence south one mile;

Thence east one mile to the southeast corner of section 32;

Thence east on section line to CCC road;

Thence northerly along said CCC road to the point where said road intersects rim of a mesa south of the north line of township 13 south, range 19 east, Salt Lake meridian;

Thence northeasterly along said rim to the northeast corner of section 26 of said township and range;

Thence north one-fourth of a mile;

Thence east one-fourth of a mile;

Thence north one-fourth of a mile to the northwest corner of the northeast quarter southwest quarter, section 24;

Thence northerly along Hill Creek approximately one and one-fourth miles;

Thence west one-fourth of a mile;

Thence south one-fourth of a mile to the quarter corner between sections 13 and 14;

Thence west two miles to the quarter corner between sections 15 and 16;

Thence north along the section line one-half mile to the southeast corner of section 9 to the top of the ridge;

All of the foregoing descriptions being in township 12 south, range 19 east, Salt Lake meridian;

Thence northerly along the top of said ridge three and three-fourths miles to the center of section 28, township 11 south, range 19 east, Salt Lake meridian;

Thence northwesterly to the CCC road;

Thence northwesterly along said road to the top rim of Wild Horse Bench;

Thence northeasterly along the top rim of Wild Horse Bench to the southeast corner of section 21;

Thence north one mile;

Thence diagonally northeast to the southwest corner of section 1;

Thence northeasterly to the north quarter corner of said section 1;

Thence east one-half mile to the intersection of CCC road at the northeast corner of said section 1;

Thence northeasterly along said road approximately four miles to where said road intersects the east line of section 20, township 10 south, range 20 east, Salt Lake meridian;

Thence north along said section line to the east quarter corner of section 8, township 10 south, range 20 east, Salt Lake meridian;

Thence northeasterly to the northwest corner of Indian Allotment Numbered 326 Uncompahgre;

Thence east to Willow Creek;

Thence northwesterly down Willow Creek to the west line of section 4, township 10 south, range 20 east, Salt Lake meridian;

Thence south along said section line to the southwest corner of section 4, said township and range;

Thence west one mile;

Thence north four miles to the northwest corner of section 20, township 9 south, range 20 east, Salt Lake meridian;

Thence west one mile;

Thence north one mile to point of beginning.

Valid rights and claims of individuals initiated under the public-land laws or otherwise involving any lands within said boundary shall not be affected by this Act. 77

The foregoing reservation shall not extend to or include deposits of uranium, thorium, and other materials reserved to the United States by section 5 (b) 7 of the Atomic Energy Act of 1946 (60 Stat. 755, 762), and shall include surface rights only in lands withdrawn by Executive Order Numbered 5327, dated April 15, 1930, as interpreted by Circular Numbered 1220, dated June 9, 1930 (53 I.D. 127), and more particularly described in a letter dated April 22, 1931, addressed to the register, Salt Lake City, Utah, by the Commissioner of the General Land Office.

Uranium, thorium, etc.

42 U.S.C. § 1805 (b) (7).

43 CFR 197 note.

There is hereby reserved, within the area above described, for the benefit and use of grazing-district permittees, a free right-of-way for trailing and watering purposes, subject to the usual and customary rules and regulations concerning stock driveways within grazing districts, the use of said right-of-way for watering purposes being limited to the usual and customary use of grazing-district permittees adjacent to said right-of-way, over the following lands:

(a) A stock driveway one mile wide along the north side of the White River Road running east from Ouray;

(b) A stock driveway described as beginning at the east quarter corner of section 3, township 9 south, range 20 east, Salt Lake meridian; running thence south eleven and one-half miles to the southeast corner of section 34, township 10 south, range 20 east, Salt Lake meridian; thence west to Willow Creek; thence northerly down Willow Creek to Black Bridge situated in the northwest quarter northeast quarter, section 22, township 10 south, range 20 east, Salt Lake meridian; thence northwesterly following the north and east boundaries of Indian allotments and tribal lands on east side of Willow Creek to the southwest corner of section 32, township 9 south, range 20 east, Salt Lake meridian; thence north five and one-fourth miles to Green River; thence up Green River and White River and on the south side of Indian allotments to point of beginning.

(c) A stock driveway one-half mile on each side of the road running southwesterly from what is known as Squaw Crossing on Willow Creek to the south rim of Wild Horse bench insofar as said road enters or crosses the said reservation;

(d) A stock driveway running from the head of Brown Canyon near the northeast corner of township

11 south, range 19 east, Salt Lake meridian, southeasterly down Brown Canyon across Hill Creek to Big Pack Mountain;

(e) A stock driveway one mile wide across Hill Creek immediately south of Rock House situated in the south half of section 13, township 12 south, range 19 east, Salt Lake meridian.

There is also reserved a watering right on Hill Creek between the Black Bridge and the Brown Ranch for the permittee using the public domain immediately west of said water place.

SEC. 2. The Secretary of the Interior is hereby authorized and directed to revoke the order dated September 26, 1933, temporarily withdrawing in aid of legislation certain lands in the former Uncompahgre Indian Reservation.

SEC. 3. The State of Utah may relinquish to the United States for the benefit of the Indians of the said Ute Reservation such tracts of school or other State-owned lands, surveyed or unsurveyed, within the said reserved area, as it may see fit, reserving to said State, if it so desires, such rights as it may possess to any minerals underlying such State lands as may be relinquished, and said State shall have the right to make selections in lieu thereof outside of the area hereby withdrawn, equal in value, as determined by the Secretary of the Interior, to the lands relinquished, from the vacant, unappropriated, nonmineral public lands, within the State of Utah, such lieu selections to be made in the manner provided in the enabling Act pertaining to said State, except as to the payment of fees or commissions, which are hereby waived. The value of improvements owned by the State on lands relinquished to the United States for the benefit of said Indians shall be taken into consideration and full credit in the form of lands shall

be allowed therefor. Any funds now or hereafter on deposit in the United States Treasury to the credit of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, are hereby made available, and with the consent of the Uintah and Ouray Tribal Business Committee, may be expended for the purchase of privately owned and State-owned lands, including the improvements thereon, and improvements heretofore placed on public lands, together with water rights and water holes, within said boundary. The title to lands purchased under this authorization may, in the discretion of the Secretary of the Interior, be taken for the surface only. Title to any lands and rights acquired hereunder shall be taken in the name of the United States in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and such lands or rights shall be exempt from State or local taxation.

Title to lands.

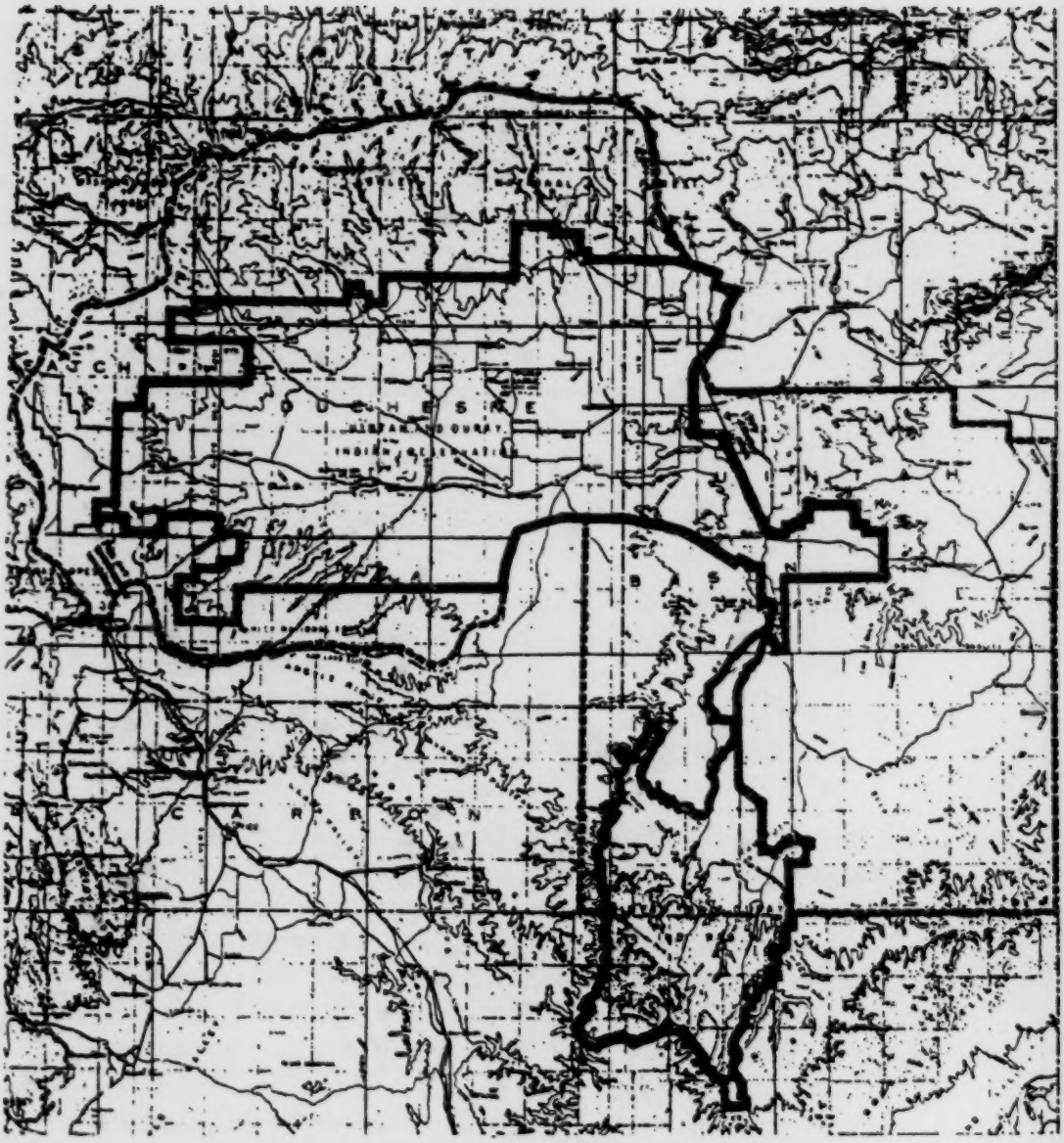
SEC. 4. In any suit now pending or hereafter brought against the United States by the Ute Indian Tribe of the Uintah and Ouray Reservation, or by any one or more of the separate bands comprising said Ute Indian Tribe of the Uintah and Ouray Reservation, in the Court of Claims, the Indian Claims Commission or before any other tribunal, the United States may claim, as an offset against any judgment recovered therein, the fair market value as of the date of this Act of any interest in public lands conveyed by section 1 hereof, and any improvements thereon, and the fair market value as of the date of the transfer of title of the lands and improvements which may be relinquished by the State of Utah to the United States under section 3 of this Act. The validity and amount of any such claim shall be determined by the court, commission, or tribunal in conformity with the provisions of section 2 of the Act of August 13, 1946 (60 Stat. 1049, 1050).

Judgments against U.S.; offset.

25 U.S.C. § 70a.

Approved, March 11, 1948.

APPENDIX B



Original 1861 and 1882 Reservation Boundaries

Present Boundaries of the Uintah and Ouray Reservation

APPENDIX E
IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

STATE OF UTAH

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MEMORANDUM FOR THE PETITIONER IN RESPONSE TO THE MOTION OF THE UTE INDIAN TRIBE

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* * *

The Tribe's primary point is that the lands selected by Utah in lieu of lost school sections are located within the boundaries of the Uncompahgre Indian Reservation as defined by an Executive Order of January 5, 1882 (Tribe's Motion C-1). That appears to be correct. It is then said, again correctly, that the question whether the named Reservation remains effective, or has been terminated, is an issue in separate proceedings between the Tribe and the State now pending before the district court. In those circumstances, the Tribe submits, it would be inappropriate for this Court to render a decision expressly or impliedly premised on the disestablishment of the Reservation.

The solution, as we have already said, is for this Court to add to its decision an explicit disclaimer of any ruling on the reservation status of the lands in dispute. The Court need intimate no opinion on that question. Yet, in determining its present procedure, the Court should be advised that, in the view of the United States, the Tribe's claim that the Uncompahgre Reservation survives is both erroneous and irrelevant.

The fact is that, for several decades at least, the Department of the Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. Of course, we may be wrong. But the Court perhaps may accord some weight to the assessment of government officials who, although not insensitive to their special responsibility to support tribal claims, find themselves unable to do so in this instance.[3]

---

[3] Insofar as the Tribe suggests that the Department of Justice has an absolute duty to assert or support any claim advanced by an Indian Tribe, we reject that proposition. See *United States* v. *Mason*, 412 U.S. 391, 398-400 (1973). The United States has, in this Court, supported

We simply list some of the impediments to the Tribe's claim: (1) Both in the abortive 1894 Act (Tribe's Motion G-1) and in the 1897 Act (Tribe's Motion D-1), Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name, denying them any claim to the proceeds derived from the sale of the surplus lands opened to entry; (2) in 1899 and 1903, after the Reservation was opened, it was referred to in legislation as "the former Uncompahgre Indian Reservation" (Act of March 1, 1899, ch. 324, 30 Stat. 924, 940; Act of March 3, 1903, ch. 994, 32 Stat. 982, 998, App., *infra*, 1a); (3) in 1948, Congress extended the Uintah and Ouray Reservation by including lands situated within the boundaries of the former Uncompahgre Reservation, a futile act if the latter Reservation still subsisted (Act of March 11, 1948, ch. 108, 62 Stat. 72); (4) in the same Act (Section 2, 62 Stat. 77), Congress once again referred to the area as "the former Uncompahgre Indian Reservation" and nothing since 1948 indicates any Congressional change of mind; (5) in 1965, the Ute Tribe obtained a stipulated judgment in the Indian Claims Commission to compensate it for the failure of the United States to provide the Uncompahgre Band with a permanent Reservation *(Ute Indian Tribe of the Uintah and Ouray Reservation* v. *United States*, 14 Ind. Cl. Comm. 707); and (6) at no time since 1897 does it appear that the Department of the Interior (or any other government agency) has treated the Reservation as still in existence. Perhaps these hurdles can be overcome. But, for us, the historic evidence compels the

---

the claim of the Ute Tribe that the Uintah and Ouray Reservation, as originally defined, has not been disestablished or diminished. See Memorandum for the United States as Amicus Curiae in No. 76-815, *Appawora* v. *Brough*, vacated and remanded, 431 U.S. 901 (1977). And the Department has determined to take the same position in the presently pending district court proceedings. But the government does not propose to support the Tribe insofar as it asserts the continued existence of the Uncompahgre Reservation.

conclusion that the Uncompahgre Reservation no longer subsists. See *De Coteau* v. *District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).

* * *

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JULY TERM—September 17, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable William E. Doyle, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges.

THE UTE INDIAN TRIBE,
Plaintiff-Appellant,
Cross-Appellee,

v.

THE STATE OF UTAH, DUCHESNE COUNTY, a political subdivision of the State of Utah, ROOSEVELT CITY, a municipal corporation, and DUCHESNE CITY, a municipal corporation, and UINTAH COUNTY,
Defendants-Appellees,
Cross-Appellants.

PARADOX PRODUCTION CORPORATION, UNITED STATES OF AMERICA, Department of Justice, Land and Natural Resources Division, STATE OF UTAH,
Amici Curiae.

JUDGEMENT

Nos. 81-1827 and 81-1901

(D.C. No. C-75-408)

This cause came on to be heard on petition for rehearing on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in part. It is ordered that the judgment of that court is reversed in part. The cause is remanded to the United States District Court for the District of Utah for further proceedings in accordance with the opinion of this Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

A True Copy

Teste

Robert L. Hoecker
Clerk, U.S. Court of
Appeals

By /s/Mary Talamas
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1821

In The
Supreme Court of the United States
October Term, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATEMENT OF RESPONDENT

Pursuant to this Court's Rules 34.2 and 22.1, Respondent Ute Indian Tribe makes this Statement for the limited purpose of correcting a misleading assertion in the Petition.

This litigation involves the question of whether Congress, when opening Indian lands to non-Indian entry in 1897 and 1905, disestablished two Ute Indian Reservations located in the remote northeast corner of the State of Utah. Three separate parcels of land were opened by the two Acts. The first parcel involves the unallotted lands of the Uncompahgre Reservation opened by the 1897 Act, nearly all of which are presently owned either by the United States or the Ute Indian Tribe. The second parcel involves the unallotted portions of the Uintah Valley Reservation where Indians and non-Indians have lived side by side for eighty years since the Reservation's opening by the 1905 Act. Finally, the third parcel involves those lands of the Uintah Valley Reservation set aside in the 1905 Act for national forest purposes under United States ownership and control. The Uintah Valley Reservation national forest lands, like the Uncompahgre Reservation lands, are uninhabited.[1]

The Court of Appeals, affirming the District Court, held that the opening of the unallotted lands of the Uintah Valley Reservation did not disestablish that Reservation. Further, the Court of Appeals reversed the District Court, and held that the opening of the unallotted lands of the Uncompahgre Reservation and the setting aside of national

---

[1] Over time the affected reservations have been referred to by a number of names. For purposes of clarity, we refer to them individually as the Uintah Valley Reservation and the Uncompahgre Reservation and together as the Ute Indian Reservations.

forest lands on the Uintah Valley Reservation also did not disestablish those two Ute Indian Reservations. The State of Utah and its subdivisions seek review of each of the Court of Appeals' rulings.

The Petition misleadingly implies that the Court of Appeals' decision suddenly thrusts a number of non-Indians living in the isolated Uinta Basin located in northeast Utah into the status of Ute Indian Reservation residents, subjecting them for the first time to some forms of federal and tribal civil jurisdiction. Pet. 10-11. A review of the lower courts' findings shows, to the contrary, that since 1905 the non-Indians of the Uinta Basin have continuously lived side by side with their Indian neighbors subject to an overlapping mixture of federal, state, and tribal influences and jurisdiction.

In the proceedings below, both courts considered the jurisdictional status of the Uinta Basin. The courts concluded that in the eighty years since the 1905 opening of the unallotted lands of the Uintah Valley Reservation, Indians (living primarily on 217,000 acres of restored opened lands) and non-Indians (living primarily on unrestored opened lands) have coexisted side by side subject to overlapping governmental jurisdiction:

> The "jurisdictional history" of the Uintah [Valley] Reservation is less than clear or consistent. Plaintiff offers evidence of the exercise of federal and tribal criminal jurisdiction over the Reservation since 1921. . . . The defendants offer a similar collection of state prosecutions beginning in 1915 and ending in 1967. . . . The annual reports of the Uintah [Valley] Agency range in reference from an acknowledgement of state jurisdiction over the reservations to the assertion of exclusive federal jurisdiction. Other historical exhibits run either direction. (footnotes omitted)

Pet. App. 265a.

> One thing is certain: the jurisdictional history of the Uintah [Valley] Reservation is not one of "unquestioned" exercise of state authority. . . . The record evidences substantial jurisdictional contributions and confusion, which are now to be resolved by the judgment of this Court.

Pet. App. 268a-269a.[2]

In actuality the real issue at hand is not that for the first time non-Indians have been thrust into a Ute Indian Reservation, but rather, the geographical scope of the Ute Indian Reservations. In a word, the Petitioners attempt to reshape the Court of Appeals' holdings from a decision that addresses land status to one that impacts people. It is important to remember that except for the unallotted lands of the Uintah Valley Reservation opened in 1905 where the Indian and non-Indian populations have lived side by side for over 80 years, most of the lands of the Ute Indian Reservation are virtually uninhabited and do not play any significant role in the lives of the non-Indian residents of the Uinta Basin. Indeed, except for the 1948 congressional action creating the 500,000 acre Hillcreek Extension of the Ute Indian Reservation (which largely sits within the boundaries of the Uncompahgre Reservation), the United States owns nearly all of the lands contained within the national forest boundary and the Uncompahgre Reservation. At best, only a handful of non-Indians and tribal members have ever inhabited these isolated lands.

---

[2] The District Court specifically addressed Petitioners' jurisdictional concerns noting: "[T]his Court's determination of the boundaries of the Unitah and Ouray Indian Reservation should simplify the administration of the law by resolving the nagging disputes that have marked the 'jurisdictional history' of that area for years." Pet. App. 290a.

Hence, the Petition is misleading when it suggests that certiorari should be granted because the Court of Appeals has dramatically changed the circumstances under which the non-Indians of the Uinta Basin are to live. In fact, as we next show, the Court of Appeals, after careful and deliberate review, confirmed that Congress has always intended that the isolated and sparsely inhabited northeast corner of Utah remain in large part Indian country under primarily federal jurisdiction.

———o———

SUMMARY OF ARGUMENT

The Petitioners claim that the Court of Appeals failed to properly apply this Court's governing precedents, and as a result this Court is obligated to review the voluminous historical record and correctly apply the well-established Reservation diminishment tests. As this Brief shows, the Court of Appeals faithfully followed this Court's well-established governing rules and concluded that the historical record contains no evidence that Congress clearly intended to disestablish the Uintah Valley and Uncompahgre Indian Reservations located in remote northeast Utah. Hence, the answers which the Petitioners seek from this Court have already been provided by the Court of Appeals. Additional review by this Court will be repetitive and is unnecessary. The Petition for certiorari should be denied.

———o———

REASONS TO DENY THE WRIT

I

THE COURT OF APPEALS FAITHFULLY APPLIED THIS COURT'S SETTLED PRECEDENTS IN HOLDING THAT THE 1897 AND 1905 ACTS DID NOT DISESTABLISH ANY PART OF THE UTE INDIAN RESERVATIONS.

The Court of Appeals diligently applied this Court's precedents governing reservation disestablishment. *See,* Pet. App. 12a, 13a, 18a, and 19a, citing *Mattz v. Arnett,* 412 U.S. 481 (1973), *DeCoteau v. District County Court,* 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), and *Solem v. Bartlett,* 465 U.S. 463 (1984). These precedents make it clear that before finding that an Indian reservation has been disestablished, a reviewing court must first "satisfy the requirement that a 'congressional determination to terminate' [an Indian reservation] be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Rosebud v. Kneip,* 430 U.S. at 586. Here, the Court of Appeals carefully reviewed the exhaustive historical record before it and determined that the statutes at issue did not show an "unequivocally demonstrated congressional intent to diminish". Pet. App. 19a, citing *Rosebud,* at 587-588. The Court of Appeals further noted that the legislative history and surrounding circumstances did not support a congressional intent to disestablish, in part because the historical record failed to show an "understanding on the part of the Tribe that they would lose their reservation". . . . Pet. App. 13a, citing *Rosebud, supra,* and *DeCoteau, supra.*

After its careful and comprehensive review of the record, the Court of Appeals concluded:

> In closing, we find no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations.[3]

Pet. App. 14a. In so holding, the Court of Appeals faithfully applied this Court's governing precedents[4] to the unique history of the Ute Indian Tribe and its 1861 and 1882 federal Reservations, established by the United States decades before Utah gained statehood. Hence, further review by this Court is not required.

---

[3] However, the Court of Appeals did find that Congress had extinguished all of the Ute tribal interests in two small portions of the Unitah Valley Reservation. Relying on the Act of May 24, 1888 (25 Stat. 157) which required a ¾th vote of the Ute tribal membership to effect a complete severance of tribal interests, and relying on the Act of April 4, 1910 (36 Stat. 269), the Court of Appeals concluded that the reservation status of the Gilsonite Strip and the Strawberry Reservoir Reclamation Project lands had been terminated. Pet. App. 24a.

[4] The dissenting opinion of the Court of Appeals inexplicably chose to disregard this Court's most recent precedent, stating "The Supreme Court in *Solem v. Bartlett,* 465 U.S. 463, 104 S. Ct. 1161, 79 L.Ed.2d 443 (1984), considered the Cheyenne River Act of May 29, 1908. The Act authorized the Secretary to *sell* portions of the Reservation within a described area with the proceeds to go to the benefit of the Indians. The opinion considers the older cases herein referred to but only decided the consequences of the Act authorizing sales. It does not provide direction as to our problem." (emphasis in the original) Pet. App. 34a.

A. The Court of Appeals Properly Found No Express Language of Cession in the Federal Statutes Opening the Uintah Valley and Uncompahgre Reservations.

First, the Court of Appeals carefully reviewed the language of each of the two opening Acts for any expression by Congress of an intent to disestablish the Reservations. In undertaking this review, it contrasted the clear and unequivocal language of cession found in certain Acts affecting the Ute Tribe's Reservation rights[5] with the more equivocal language utilized by Congress in the 1897 Act opening the Uncompahgre Reservation and the 1905 Act opening the Uintah Valley Reservation. Pet. App. 24a-25a.

In reviewing the language of the 1897 Uncompahgre Reservation opening Act (quoted below), the Court of Appeals found no congressional plan to extinguish all Indian interests in the Reservation. Pet. App. 18a-19a, citing *Mattz* and *Rosebud*.

> And all the lands of said Uncompahgre Reservation now theretofore allotted in severalty to said Uncompahgre Utes shall . . . be open for location and

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[5] *See*, Act of May 24, 1888, 25 Stat. 157 (terminating the Gilsonite Strip through a ¾ vote of the tribal membership); Act of April 4, 1910, 36 Stat. 269 (terminating the Strawberry Reservoir reclamation lands); and the Act of June 15, 1880, 21 Stat. 199 (extinguishing the Ute Indians' rights to their Colorado Reservation). In the Act of April 4, 1910, Congress provided that "All right, title and interest of the Indians in the same [reclamation] lands are hereby extinguished . . . .", 36 Stat. at 285, and in the Act of June 15, 1880, Congress ratified an agreement with the Ute Indians where the Indians agreed to "cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement. 21 Stat. at 201.

entry under all of the land laws of the United States. . . .

30 Stat. 87.

Similarly, in reviewing the language of the 1905 Act opening up the unallotted lands on the Uintah Valley Reservation, the Court of Appeals found no congressional intent to disestablish. As noted below, the 1905 opening language is remarkably similar to the 1892 opening Act found by this Court in *Mattz v. Arnett, supra,* not to have disestablished the Klamath River Indian Reservation.

1905 Uintah Valley Act	*1892 Klamath Act*
That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and townsite laws of the United States.	That all of the lands embraced in what was Klamath River Reservation . . . are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights. . . .
33 Stat. at 1069.	27 Stat. at 52.

Finally, the Court of Appeals scrutinized the following language of the 1905 Act for evidence of congressional intent to remove the forest lands from the Reservation.

> That before the opening of the Uintah [Valley] Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, . . . such portion of the lands within the Uintah [Valley] Reservation as he considers necessary, and he may also set apart and reserve [reclamation] lands necessary to conserve and protect the water supply for the Indians. . . .

33 Stat. at 1070.

In scrutinizing this language, the Court of Appeals noted that when Congress desired to disestablish the Reserva-

tion reclamation lands set apart by the equivocal language quoted above, Congress felt it necessary to enact separate legislation five years later (in 1910) expressly extinguishing the Ute Indians' rights to such lands:

> All right, title and interest of the Indians in the same [reclamation] lands are hereby extinguished, and control thereof shall pass to the owners of the land irrigated from said project. . . .

36 Stat. at 285.[6] The Court of Appeals, finding no subsequent congressional legislation paralleling the above quoted act extinguishing the Reservation reclamation lands, concluded that the 1905 Act did not on its face show a clear congressional intent to disestablish the Reservation forest lands. Pet. App. 28a.

The Court of Appeals' rulings that the 1897 and 1905 opening Acts do not on their face reveal "a congressional determination to terminate" are mandated by a faithful application of this Court's governing precedents, and do not require review.

B. The Court of Appeals Correctly Held That The Legislative History and Surrounding Circumstances Do Not Indicate An Unambiguous Congressional Intent to Terminate the Ute Indian Reservations.

After carefully reviewing the language of the 1897 and 1905 Acts, the Court of Appeals turned to the second part of the test set forth by this Court's governing precedents and inquired whether a congressional intent to dis-

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[6] As noted *supra*, p. 6, n.3, the Court of Appeals held these reclamation lands, as well as the Gilsonite Strip lands, to be disestablished. The Tribe does not contest these conclusions.

establish is "clear from the surrounding circumstances and legislative history" of the opening acts. *Rosebud*, 430 U.S. at 586.

With respect to the Uncompahgre Reservation, the Court of Appeals noted that the Uncompahgre Utes never bargained with the United States for the termination of their reservation as did the Sioux Indians in *Rosebud* and *DeCoteau*, but indeed opposed the proposed opening. Pet. App. 19a. The Court of Appeals also found that in 1897 Congress was not at all concerned with disestablishing boundaries, but rather was concerned with questions of title, specifically providing non-Indians access to gilsonite and other minerals found on the Uncompahgre Reservation. Pet. App. 23a. Finally, the Court of Appeals observed that while references in newspapers and other documents at the time of the opening included ambiguous references to the Reservation as "old" or "former", the most significant and meaningful event occurring since opening was supportive of continued reservation status—namely the restoration by Congress of 500,000 acres of Hillcreek Extension trust lands located primarily within the Uncompahgre Reservation to Ute Indian Tribe ownership in 1948. Pet. App. 13a.

Turning to the unallotted lands opened on the Uintah Valley Reservation, the Court of Appeals affirmed the findings of the District Court that the legislative history and surrounding circumstances failed to show a clear congressional intent to extinguish Reservation boundaries. Both courts relied upon the following facets of the legislative history: first, that in contrast to the Sioux In-

dians involved in the Reservation openings examined in *DeCoteau* and *Rosebud*, the Ute Indians were "unanimously opposed" to the opening of their Reservation, Pet. App. 207a; second, that the 1905 Act was understood by Congress to restrict the opening of the Reservation to entries only under the homestead and townsite laws and in so doing superseded the public domain language found earlier in the 1902 Act, Pet. App. 234a-235a; and third, that a 1945 Secretary of Interior order restoring 217,000 acres of opened lands to the Ute Indian Tribe was found in a formal opinion of the Solicitor of the Department of the Interior to include minerals underlying fee patented lands located within the Uintah Valley Reservation. Pet. App. 264a, citing 59 I.D. 393, 396 (1947). Based on these findings and others, both courts concluded that the legislative history and surrounding circumstances do not show a congressional intent to disestablish.

Finally, with respect to the setting apart of national forest lands, the Court of Appeals first found that the congressional purposes for creating national forest lands as of the time of opening in 1905, including the protection of the watershed, the protection of timber resources, and the protection of fish and game could be fully achieved on national forest lands located within the Uintah Valley Reservation boundary. Pet. App. 27a. The Court of Appeals also noted that the inclusion of the national forest lands within the Uintah Valley Reservation was wholly consistent with subsequent acts of Congress compensating the Tribe for the value of its timber reserves and then later restoring subsurface mineral interests on a portion of the forest lands to the Tribe. Pet. App. 29a. For all of these reasons, the Court of Appeals correctly concluded

that the legislative history and surrounding circumstances contained no evidence of a congressional intent to extinguish the Ute Indian Reservations or to reduce the boundaries of the Reservations.

C. The Court of Appeals Properly Concluded That Post-Opening Events Do Not Reveal a Clear Congressional Intent to Disestablish.

In each disestablishment case this Court has given some consideration to post-opening events in determining whether Congress clearly intended to disestablish. *See, e.g., Mattz,* 412 U.S. at 505; *DeCoteau,* 420 U.S. at 442-448; and *Rosebud,* 430 U.S. at 604-605. In accordance with these governing precedents, the Court of Appeals also considered post-opening events.

With respect to the post-opening events affecting the Uncompahgre Reservation, the Court of Appeals adhered to this Court's ruling in *Mattz,* and found that the 1948 restoration of 500,000 acres of Hillcreek Extension tribal lands primarily located within the Uncompahgre Reservation boundaries was "suggestive of continued reservation status". Pet. App. 13a. Moreover, the Court of Appeals followed the teachings of *DeCoteau* and *Solem,* in noting that there was no indication of a number of settlers "flooding" into the opened portion of the Reservation causing the area to lose its Indian character. Significantly the Court of Appeals found to the contrary: "Few people, Indian or non-Indian live there today. The character of the area is not changed to such an extent that the reservation has de facto disappeared." Pet. App. 25a.

With respect to the unallotted portions of the Uintah Valley Reservation, the lower courts found a long time pattern of inconsistent and overlapping federal, state, and tribal jurisdiction, and concluded: "One thing is certain: the jurisdictional history of the [Uintah Valley] Reservation is not one of 'unquestioned' exercise of state authority . . . ." Pet. App. 268a-269a, citing *Rosebud*. Finally, when examining the post-opening events affecting the national forest lands, the Court of Appeals took note of Congress' post opening payment of compensation to the Ute Indian Tribe for the value of timber lands as well as Congress' subsequent decision to return a portion of the forest lands to Ute tribal ownership. Pet. App. 29a. The Court of Appeals found an uninterrupted congressional policy for national forest lands which gives priority to federal management while permitting state, and in this case, tribal participation in the regulation of hunting and fishing. Pet. App. 27a. As a result the Court of Appeals correctly concluded that Congress had never "clearly evidenced" an intention to disestablish the Ute Indian Reservations' boundaries. Pet. App. 26a.

II

THE COURT OF APPEALS CORRECTLY FOLLOWED THIS COURT'S PRECEDENTS IN RULING THAT THE PHRASE "RESTORE TO THE PUBLIC DOMAIN" APPEARING IN TWO STATUTES SUPERSEDED BY THE 1897 AND 1905 OPENING ACTS DID NOT EFFECT A DISESTABLISHMENT.

In Part I we showed how the Court of Appeals properly applied this Court's governing precedents in holding that neither the 1897 nor the 1905 opening Act effected a

disestablishment of the Ute Indian Reservations. In this Part II, we show that the Court of Appeals also correctly followed this Court's teachings in holding that the phrase "restore to the public domain" appearing in certain predecessor statutes (but omitted from the operative 1897 and 1905 opening Acts) did not effect a disestablishment of the Uncompahgre and Uintah Valley Reservations. The Petitioners repeatedly draw this Court's attention to the superseded 1894 and 1902 legislation and away from the operative 1897 and 1905 opening Acts which, of course, contain no language resembling "restore to the public domain". Notwithstanding Congress' removal of this phrase, Petitioners ask this Court to disregard the holding in its most recent disestablishment case, *Solem v. Bartlett, supra*, and find that appearance of "restore to the public domain" in superseded legislation effected an extinguishment of the Uncompahgre and Uintah Valley Reservations. As the Court of Appeals concluded, this contention does not withstand analysis.

In analyzing the effect of the phrase "restore to the public domain," the Court of Appeals once again carefully applied the governing principles set out by this Court. Pet. App. 18a. In *Solem*, this Court discussed the impact of "public domain" language appearing in the 1908 Act opening the Cheyenne Indian Reservations.[7] In the 1908 Act, Congress provided that once the lands were opened, tribal members would be able to harvest timber on the lands but "only as long as the lands remain part of the public domain." *Solem*, 465 U.S. at 475. This Court noted

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[7] Act of May 29, 1908, 35 Stat. 460.

that while such a phrase was supportive of a finding of diminishment it was not dispositive, in part because it may well have referred to land title rather than to a diminishment in reservation boundaries. Indeed, this Court observed: "There is also considerable doubt as to what Congress meant in using the phrase public domain". *Solem,* 465 U.S. at 475, n.17. This Court concluded that when balanced against the limited goal of the 1908 Act (to open the Cheyenne Indian Reservation to non-Indian entry but not to disestablish the Reservation), the presence of the phrase "public domain" "cannot carry the burden of establishing an express congressional purpose to diminish". *Id.*

This Court's holdings in *Solem* as to the meaning and weight to be given the phrase "public domain" operate *a fortiorari* in the setting of the opening Acts affecting the Ute Indian Reservations. In *Solem,* the phrase was placed by Congress in the operative 1908 opening law, and yet this Court held the phrase was not sufficient to carry the burden of establishing a congressional purpose to diminish. In the present case, the phrase "restore to the public domain" is found only in predecessor statutes enacted in 1894 and 1902, and not in the 1897 and 1905 operative opening Acts. Congress chose to replace the words "restore to the public domain" when enacting the 1897 and 1905 operative laws which actually opened the Uncompahgre Reservation and the Uintah Valley Reservation with language markedly similar to language found by this Court in *Mattz v. Arnett* not to effect a disestablishment. *See, supra,* p. 8.

Once again, the Court of Appeals' analysis of the phrase "restore to the public domain" tracked this Court's

governing holdings and acknowledged that the phrase "public domain" is ambiguous in portent and can relate both to title and to boundary. Pet. App. 18a. The Court of Appeals further noted that "[i]n the case before us the ambiguity of the term is only heightened by its subsequent exclusion in the 1897 Act"[8], and held, as did this Court in *Solem*, that the presence of "public domain language alone is insufficient to support a finding of explicit congressional intent to disestablish". Pet. App. 18a.

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[8] Citing, *Mattz*, the Court of Appeals emphasized that because the "terms of the 1894 Act were never fulfilled" and "the effort to impose the Act on the Uncompahgres was dropped in 1895", it declined to find a clear intent to disestablish from a phrase found ambiguous by this Court and appearing only in the "unrealized" 1894 Act but not in the operative 1897 opening Act. Pet. App. 18a and n.4.

CONCLUSION

In holding that no disestablishment occurred, the Court of Appeals faithfully applied this Court's numerous precedents to the unique history of the two Ute Indian Reservations in northeast Utah. Hence, the Petition for a Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY and DUCHESNE CITY, UTAH

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

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1. In light of the Tribe's response, Petitioners suggest that it may be appropriate for the Court to invite the United States to express its views in this case. Since *Seymour*, the Court has issued such orders prior to granting certiorari in each of the reservation boundary cases it has decided.[1]

The court below held that the Tribe's original 4-million acre reservation had not been diminished to a 1-million acre reservation as Petitioners had argued.[2] But in 1954, the Ute Indian Tribe of the Uintah and Ouray Reservation[3]—the Respondent here—stated in congressional hearings that its reservation only "embraces an area of some 1,065,000 acres. . . ."[4] Relying on that representation,[5] Congress enacted the

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[1] See the Orders in *Solem v. Bartlett*, 460 U.S. 1035 (1983); *Rosebud Sioux Tribe v. Kneip*, 423 U.S. 1047 (1976); *DeCouteau v. District County Court*, 416 U.S. 966 (1974); *Mattz v. Arnett*, 409 U.S. 819 (1972); *Seymour v. Superintendent*, 368 U.S. 351, 352 (1962).

[2] The original Uncompahgre and Uintah reservations, which the court of appeals held still exist undiminished, contained approximately 4 million acres. Pet. 2. What had been considered the Tribe's reservation until this case comprised approximately 1 million acres of trust lands. Pet. 5.

[3] The Tribe's reservation today, whatever its exterior boundaries may be, is called the "Uintah and Ouray Reservation" and the respondent Tribe is officially designated the "Ute Indian Tribe of the Uintah and Ouray Reservation" (*e.g.* 25 U.S.C. § 671). See Pet. App. 113a-114a.

[4] Hearings on S. 3532 and H.R. 9398 before the Subcommittee of the Senate Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. 5 (June 9, 1954) (unpublished) (testimony of the Chairman of the Tribe's Business Committee). See note 8 *infra*.

[5] See S. Rep. No. 1632, 83d Cong., 2d Sess. 6 (1954), which was part of the record in this case (L.D. 193).

Ute Partition Act (68 Stat. 868, as amended, 25 U.S.C. §§ 677-677aa), dividing the Tribe's assets between its full-blood and mixed-blood members.

When a case involving the Ute Partition Act reached this Court, the United States also took the position, consistent with the Tribe's submission to Congress but contrary to the decision here, that the Tribe's reservation consisted of trust lands[6]—some 1 million acres.[7] As the Petition points out (at p.9), this Court relied on the representations of the Tribe[8] and the United States and stated in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141 (1972), that "There is, and can be, no dispute that the United States holds title to the land, including mineral interests, constituting the Uintah and Ouray Reservation." 406 U.S. at 141. The Court's statement is, as the Petition further indicated, directly contradicted by the decision below.

Thus, prior to the instant case, this Court, the United States and the Tribe itself had taken the position that the Ute Tribe's reservation consisted of 1 million acres, not the 4 million acres encompassed within the boundaries of the original Uncompahgre and Uintah reservations, as the court below held. But the Tribe, in opposing certiorari, says not a word

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[6] See Brief for the United States and Brief for the Securities and Exchange Commission as Amicus Curiae in *Reyos*, at p.28, No.70-78, October Term 1971, in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972).

[7] See note 2 *supra*.

[8] The Hearings (note 4 *supra*) were part of the record in *Affiliated Ute Citizens*. See Brief for the United States, note 6 *supra*, at p.33 n.28.

about *Affiliated Ute Citizens v. United States*. It fails to confront the federal government's representations to this Court in *Andrus v. Utah*, 446 U.S. 500 (1980), that the original Uncompaghre reservation does not exist and has not existed since 1897. See Pet. 9; Pet. App. 366a-369a. And it does not, indeed cannot, explain why—if the decision below is correct—the Tribe was entitled to recover damages, as it did, against the United States in 1965 on the basis of its claim that the Uncompahgre Band of Utes "have lost the reservation set aside for their use," that the federal government "refused to provide any reservation for said Indians," and that the government did not maintain the original "Uncompahgre Reservation in Utah as a reservation."[9] See Pet. 10-11 n.22; *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, ___ U.S. ___, 105 S.Ct. 3420, 3432 (1985).

Petitioners therefore respectfully suggest that the Court may wish to invite the United States to file a brief expressing its view in this case.

2. The Tribe does not question that at least 18,000 non-Indians live in the disputed area while the total membership of the Tribe is only 1,500. See Pet. 10.[10] The Tribe says, however, that one area—the disputed

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[9] See the Tribe's Petition, at p.7, in *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 349, 14 Ind. Cl. Comm. 707 (1965).

[10] The Tribe also says that Petitioners have attempted to "reshape" the decision below "from a decision that addresses land status to one that impacts people." Brief in Opp., at 3. One of the fundamental errors of the court of appeals is that it never considered the impact on people, which it was required to do. See *Solem v. Bartlett*, 465 U.S. 463, 471-72 & n.12 (1984), and the Petition in this case, at p.21.

portion of the original Uncompaghre reservation—is thinly populated. Brief in Opp., at 3. What the Tribe does not explain is why this area, which has not been treated as a reservation since 1897, should now be deemed such when there is no evidence that even a single tribal member lives there, when there is not even one acre of Indian land there[11], when in the words of *Solem* the area "has long since lost its Indian character" (465 U.S. at 471).

On the other hand, it is not true that this area plays no "significant role in the lives of the non-Indian residents of the Unita Basin" (Brief in Opp., at p.3). The record lends no support to such an assertion and, to the contrary, shows that the area contains major mining and other industrial interests, including those involving gilsonite. See Pet. App. 22a-23a; Joint Ex. 479; and Appendix C & D, to the Supp. Brief filed by Petitioners Counties and Cities in the court below. The area, moreover, is also part of the Vernal Grazing District established pursuant to the Taylor Grazing Act, 43 U.S.C. 315, *et seq.*[12] Yet if, as the court below held, the area should now be considered an Indian reservation, all grazing permits would have to be cancelled. The Taylor Grazing Act specifically provides that the Secretary of the Interior may not establish grazing districts in "Indian reservations." 43 U.S.C. § 315.

This is a matter of major significance. Indeed, when Congress extended the Tribe's reservation in 1948 to

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[11] See the map lodged with this Court (Pet. 2 n.1) (Ex. I-1B). The map shows that there are substantial amounts of State and private lands within this area.

[12] See the map lodged with the Court (Pet. 2 n.1), which depicts the "District Boundary" in gray lines.

encompass part of the former Uncompahgre reservation—the "Hill Creek Extension"[13]—it carefully "reserved . . . for the benefit of and use of grazing district permittees, a free right-of-way for trailing and watering purposes" through the newly-added portion of the reservation to the area in dispute here. (Pet. App. 362a). Under the decision below, however, those "stock driveways" (Pet. App. 362a) will no longer lead to Taylor Grazing Act areas, but to an Indian reservation where grazing permits will not be valid despite the absence of any Indian presence in the region.[14]

3. The Tribe contends that the "public domain" language in the 1894 Act (Uncompahgre) and the 1902 Act (Uintah) had no effect because two later statutes—the 1897 Act (Uncompahgre) and the 1905 Act (Uintah)—were the operative legislation and these contained no such language (Brief in Opp., at 14-15). Not even the court below adopted this argument with respect to the original Uncompahgre reservation. Assuming the restored-to-the-public domain provision of the 1894 Act was implemented by the 1897 Act,[15] the

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[13] See Pet. 4-5 & n.11. The reservation status of the Hill Creek Extension is not at issue.

[14] This is a further reason why the United States should be called upon to express its views in this case. The issuance of Taylor Grazing Act permits by the Department of the Interior, which it has been doing for more than 40 years (Pet. App. 362a), is flatly inconsistent with the decision of the court below that the area is part of an Indian reservation.

[15] There has never been any doubt on this score. The United States, for example, answered the Tribe's petition in the Indian Claims Commission (see note 9 *supra*) by stating that with respect to the original Uncompahgre reservation—which the Tribe

court's point instead was that *Solem v. Bartlett, supra,* altered the settled rule that such language constituted a clear and unequivocal expression of disestablishment. See Pet. App. 11a-12a. As discussed in the Petition, it is on that point that *en banc* majority erred and rendered a decision in conflict with the decisions of this Court and the lower federal courts. See Pet. 14-21.[16]

4. The Tribe's remaining argument appears to be that because the Tribe was compensated for lands within the original Uintah reservation that, in 1905, were reserved for a national forest,[17] this shows that the reservation was not disestablished. Brief in Opp., at 13. To the contrary, it shows instead that the reservation ceased to exist.

The Tribe was compensated twice for the 1 million acres that is now a national forest, first pursuant to the Act of February 13, 1931, 46 Stat. 1092, in the

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itself alleged had been disestablished—the Tribe "suffered no loss by the restoration to the public domain . . . of the unallotted lands within the area. . . ." Answer of the United States, at p.17 (March 9, 1954), in *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States,* note 9 *supra.*

[16] In regard to the original Uintah reservation, the legislative history clearly shows, as the Petition discusses (Pet. 25-27), that the 1905 Act implemented the 1902 Act. The Tribe has no response. Moreover, the Court of Claims—accepting the Tribe's arguments—held that the 1905 Act implemented the 1902 Act and that pursuant to the 1902 Act allotments were made to tribal members "and surplus lands (with the exception of forest reserve and reclamation withdrawals and certain minimal entries) were restored to the public domain. . . ." *Uintah and White River Bands of Ute Indians v. United States,* 139 Ct. Cl. 1, 22 (1957).

[17] See Pet., at 28-29.

amount of $1.2 million. Dissatisfied with that payment, the Tribe sued the United States in the Court of Claims and—again contradicting the decision below and its position here—claimed "just compensation for 973,777 acres of the *former* Uintah Indian Reservation in Utah, taken by the United States on July 14, 1905, by incorporation into the Uintah National Forest." *Uintah and White River Bands of Ute Indians v. United States, supra*, 139 Ct. Cl. at 2-3 (emphasis added). The Court of Claims in that case awarded the Tribe an additional $879,000 plus interest from 1905 on the basis, in part, that the area had formerly been part of the Tribe's reservation; indeed, throughout its findings of fact, the Court of Claims referred to the "former Uintah Indian Reservation" (*e.g.* 139 Ct. Cl. at 28, 56, 64, 69, 70).

Thus, although "[t]here is, and can be, no dispute"[18] that the Tribe's reservation consists only of trust lands, the court below ruled to the contrary and in doing so has rendered a decision warranting review by this Court.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted. In addition, it may be appropriate for the Court to invite the United States to express its views in this case.

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[18] *Affiliated Ute Citizens v. United States, supra*, 406 U.S. at 141.

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No. 85-1821

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF UTAH, ET AL., PETITIONERS

v.

UTE INDIAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Uintah Indian Reservation in Utah was disestablished or diminished by the Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1069, which provided that some unallotted lands of the Reservation would be included in a national forest reserve and that the remaining unallotted lands "shall be disposed of under the general provisions of the homestead and town-site laws of the United States."

2. Whether the Uncompahgre Indian Reservation in Utah was disestablished by the Act of June 7, 1897, ch. 3, § 1, 30 Stat. 87, which provided that all lands of the Reservation not allotted in severalty to the Uncompahgre Ute Indians by a specified date shall "be open for location and entry under all the land laws of the United States" and which did not provide for the payment of any compensation to the Uncompahgre Indians for those lands.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1821

STATE OF UTAH, ET AL., PETITIONERS

v.

UTE INDIAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Uintah Indian Reservation in northeastern Utah was established by Executive Order in 1861 (Pet. App. 292a) and confirmed by Congress in 1864 (Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63). In an agreement approved by Congress in 1880, the White River Utes ceded their interest in a reservation in Colorado and agreed to accept allotments on the Uintah Reservation. Act of June 15, 1880, ch. 223, § 1, 21 Stat. 200. In the same agreement, the Uncompahgre Utes ceded their interest in the Colorado reservation and agreed to accept allotments elsewhere (21 Stat. 200). The land selected for the Uncompahgres was in Utah, adjacent to the Uintah Reservation, and was set apart as the Uncompahgre Reservation by Executive Order in 1882 (Pet. App. 308a).

b. In 1888, with the consent of three-fourths of the Indians, Congress "restored to the public domain" a 7,040-acre triangle on the eastern edge of the Unitah Reservation that contained gilsonite mineral deposits. The land

was to be sold and the proceeds held in trust for the Tribes. Act of May 24, 1888, ch. 310, 25 Stat. 157 *et seq.*; see Pet. App. 165a-169a.

c. In 1894, Congress directed the President to appoint a commission to allot land on the Uncompahgre Reservation, after which the unallotted lands would "be restored to the public domain." Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337. The 1894 Act provided for settlers to pay $1.50 per acre for the opened land, but did *not* provide for the proceeds to be paid to the Uncompahgres (§ 21, 28 Stat. 337). The 1894 Act also directed the commission to negotiate with the Indians on the Uintah Reservation for the acceptance of allotments and "the relinquishment to the United States" of unallotted lands (§ 22, 28 Stat. 337). The differing treatment reflected the view that the Indians on the Uintah Reservation owned their lands, and that a cession agreement and compensation therefore were required to open their surplus lands to settlement by non-Indians, but that the Uncompahgres occupied their lands only temporarily, until they took allotments under the 1880 agreement (Pet. App. 170a-171a & n.89, 181a-182a, 185a-186a & nn.112, 113).

In 1897, Congress once again mandated that allotments be made to the Uncompahgres, but this time on either the Uncompahgre or Uintah Reservation, because there was not enough suitable land on the Uncompahgre Reservation alone (Pet. App. 173a, 177a-178a). Congress further stipulated that all lands on the Uncompahgre Reservation that were not allotted by April 1, 1898 shall "be open for location and entry under all the land laws of the United States." Act of June 7, 1897, ch. 3, § 1, 30 Stat. 62. Because of doubts about the legality of allotments made after that deadline (*ibid.*), Congress in the following year authorized the Secretary to approve 83 allotments "within the former Uncompahgre Indian Reservation." Act of Mar. 1, 1899, ch. 324, § 1, 30 Stat. 940-941. The Secretary later approved 584 allotments to Uncompahgres on the Uintah Reservation (Pet. App. 179a-180a).

d. In 1898, Congress directed the Secretary to appoint another commission to negotiate an agreement for allotment of Uintah Reservation lands and "cession to the United States" of unallotted lands. Act of June 4, 1898, ch. 376, §§ 1-2, 30 Stat. 429. When the Uintah and White River Utes resisted, Senator Rawlins of Utah introduced a bill that would have unilaterally reduced the size of the Reservation (Pet. App. 196a-199a). However, the diminishment bill did not pass (*id.* at 199a), and Congress instead passed an Act in 1902 that provided for the Secretary to allot lands only with the consent of the Indians, with the allotments to be made prior to October 1, 1903. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264. The Act further provided that "all the unallotted lands within said reservation shall be restored to the public domain" and that the proceeds of the sale of the land to homesteaders w uld be used for the benefit of the Indians (*ibid.*). Immediately thereafter, Congress passed an amending resolution that, "[i]n addition to the allotment in severalty," directed the Secretary to set apart grazing lands "for the use in common of the Indians of [the Uintah] reservation" (J. Res. 31, 32 Stat. 744).

e. Subsequently, Congress provided that if the Uintah and White River Utes did not give their consent by June 1, 1903, the Secretary was unilaterally to allot the amount of land specified in the 1902 Act. Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-998. When the Uintah and White River Utes once again opposed the plan for allotment and cession (Pet. App. 205a-208a), Congress extended the opening date to March 10, 1905 (Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208). Finally, in 1905, Congress extended the opening date to September 1, 1905, but specified that the unallotted lands "shall be disposed of under the general provisions of the homestead and town-site laws of the United States." Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1069-1070. The 1905 Act also authorized the President, before opening the Reservation, to: (i) "set apart and reserve as an addition to the Uintah Forest Reserve * * * such portion

of the lands within the Uintah Indian Reservation as he considers necessary," and (ii) to set apart a reservoir site (33 Stat. 1070). The proceeds from the sale of timber on the forest lands prior to June 30, 1920 were to be paid to the Indians (*ibid.*).

By a series of proclamations issued in the summer of 1905, some 1,010,000 acres "in the said Uintah Indian Reservation" were added to the Uintah Forest Reserve (Pet. App. 327a); townsites "in the Uintah Indian Reservation Lands" were reserved for later disposal (*id.* at 339a); 56,000 acres "in the Uintah Indian Reservation" were withdrawn from disposal for a reservoir site (*id.* at 344a); and the remaining unallotted lands "in said reservation" were opened to settlement under the homestead laws (*id.* at 333a). See Pet. App. 222a-223a, 326a-350a.

f. In 1910, Congress authorized payment to the Uintah Indians of $1.25 per acre for the lands that had been set apart for reservoir purposes in 1905, adding that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished." Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285. Finally, in 1948, Congress "extended" the "exterior boundary" of the Uintah Reservation (by then known as the Uintah and Ouray Reservation) to include approximately 510,000 acres (the Hill Creek Extension) within the area of the original Uncompahgre Reservation. Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72. See Pet. App. 186a-190a, 272a.

2. a. Respondent Ute Indian Tribe is composed of the Uintah, Uncompahgre, and White River Bands (Pet. App. 152a). Effective September 15, 1975, the Tribe adopted a Law and Order Code, which defined the Tribe's territorial jurisdiction to be all lands within the " 'original confines of the Uintah and Ouray Reservation,' " as set forth in the Executive Orders of 1861 and 1882 and the Acts of May 27 and June 19, 1902 and March 11, 1948, except as otherwise provided by law (Pet. App. 118a n.8). The local-government petitioners opposed that territorial claim. The Tribe then filed this suit in the United States District Court for the District of Utah in October

1975, seeking a declaratory judgment that all land within the original boundaries of the Uintah and Uncompahgre Reservations—including land owned by non-Indians—is "Indian country" under 18 U.S.C. 1151.[1]

In an exhaustive opinion rendered on June 19, 1981 (Pet. App. 112a-291a), the district court held (i) that the original Uncompahgre Reservation was disestablished by Congress in 1897 (*id.* at 169a-191a); (ii) that the Uintah Reservation was not diminished when it was opened to settlement in 1905 (*id.* at 191a-245a, 258a-281a); but (iii) that the Uintah Reservation was diminished to the extent of the 1905 withdrawal of 1,010,000 acres for national forest purposes (*id.* at 245a-257a).[2]

b. A divided panel of the court of appeals ruled against the Tribe on these three issues (Pet. App. 66a-111a). However, on rehearing en banc after this Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), the court of appeals held in a 5-2 decision that neither the Uintah nor the Uncompahgre Reservation was diminished (Pet. App. 1a-62a).

DISCUSSION

The court of appeals, applying the principles of this Court's unanimous decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), correctly held that the Uintah Reservation was not diminished in 1905 by the opening of some unallotted lands to non-Indian settlement or by the inclusion of other lands in the forest reserve. That holding accords with the view of the United States, both in *Appawora* v. *Brough*, 431 U.S. 901 (1977), and in the

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[1] The term "Indian country" is defined by 18 U.S.C. 1151 to mean, inter alia, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent," and all Indian allotments (including those outside a reservation) to which Indian title has not been extinguished.

[2] The district court also held that the Gilsonite Strip and reclamation lands were separated from the Reservation (Pet. App. 165a-169a, 257a-258a). The Tribe did not appeal those rulings, and they are not at issue here.

courts below in this case, and it does not conflict with any decision of the Utah courts or present an issue of significant practical importance. Although we believe that the original Uncompahgre Reservation was disestablished in 1898, the court of appeals' contrary holding does not warrant review. The court followed the analytical framework of *Solem* v. *Bartlett*, *supra*, erring only in the particular result it reached, and, unlike in *Solem*, there is no conflict with state court decisions. Moreover, this aspect of the decision below is of little practical importance, because the land in the original Uncompahgre Reservation is largely uninhabited and is primarily owned by the United States. Review by this Court, therefore, is not warranted.

A. *General Principles.* The Uintah and Uncompahgre Reservations were opened to non-Indian settlement pursuant to surplus land Acts passed in 1905 and 1897. The Congresses that passed those Acts no doubt anticipated the eventual demise of the reservation system. But the Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations, see, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and other surplus land Acts did not, see, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962)." *Solem*, 465 U.S. at 468-469. As explained in *Solem*, the Court has established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those Acts that simply permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries (*id.* at 470).

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation

status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The most probative evidence of congressional intent is the statutory language used to open the reservation. Language that explicitly refers to a "cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress meant to sever it from the reservation (*ibid.*). When such language is accompanied by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished" (*id.* at 470-471). However, cession language and unconditional compensation are not absolute prerequisites to a finding of diminishment. "When events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress so intended (*id.* at 471). "There are, of course, limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land act" (*id.* at 472). Accordingly, if the text and legislative history of the Act fail to reveal "substantial and compelling evidence of a congressional intention" to diminish, the "traditional solicitude for the Indian tribes" requires a ruling that the reservation remains intact (*ibid.*).

B. *Uintah Reservation.* Applying the foregoing principles, the court of appeals correctly found an absence of "substantial and compelling evidence of a congressional intention" to diminish the Uintah Reservation in 1905 by either (1) the opening of certain unallotted lands to non-Indian settlement, or (2) the addition of other such lands to the forest reserve.

1. a. The 1905 Act provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States" (33 Stat. 1069). This language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in unallotted lands (*Solem*, 465 U.S. at 470).

Compare *DeCoteau*, 420 U.S. at 445 (citation omitted) (finding disestablishment where the Indians did " 'cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands' "); *Rosebud*, 430 U.S. at 583-584 (same). Indeed, the Act involved in *Solem*, which was held *not* to effect a diminishment, also provided for the disposition of unallotted lands under the "homestead and townsite laws" (Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461). And in *Seymour* and *Mattz*, the Court unanimously held that similar statutes did not terminate the reservation, but merely " 'open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards' " (*Mattz*, 412 U.S. at 497 (quoting *Seymour*, 368 U.S. at 356)). See also Pet. App. 218a-219a (collecting cases). It was not unreasonable for the court of appeals to give a similar construction to the 1905 Act that opened the Uintah Reservation to settlement.

b. Other features of the 1905 Act also weigh against a finding of diminishment. The Act did not provide for the payment of a sum certain by the United States, which would have suggested an intent to effect an immediate divestment of all tribal interests as a quid pro quo. *DeCoteau*, 420 U.S. at 445-446; *Rosebud*, 430 U.S. at 598 n.20. Rather, the Tribe was to receive payment for unallotted lands only if and when they were sold, and in the meantime it retained an equitable interest in them. *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920). Nor did the 1905 Act incorporate a cession agreement between the Tribe and the United States, such as those incorporated into the 1891 and 1904 Acts that were held in *DeCoteau* and *Rosebud* to have effected a disestablishment (420 U.S. at 445; 430 U.S. at 597).[3]

[3] The Court stressed in *Rosebud* that the 1907 and 1910 Acts in that case, which did not contain comparable cession language, nevertheless gained the approval of a majority of the Indians (430 U.S. at 607, 610-611) and carried forward the intent of the 1904

Although under *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), the consent of the Indians was not *required*, the "traditional solicitude for the Indian tribes" (*Solem*, 465 U.S. at 472) counsels reluctance to infer an intent to diminish where, as here, Congress was not acting in substantial compliance with consent previously given by the Indians and the Indians in fact steadfastly opposed the very concept of cession. *Rosebud*, 430 U.S. at 595 n.17, 606-607 & n.32, 610 & n.41; *Solem*, 465 U.S. at 469 n.10, 470, 471, 477 & n.21, 478. Finally, the 1905 Act contained no provisions extending liquor laws or granting school sections to the State in the opened lands, which were found to be relevant in *Rosebud*. See 430 U.S. at 599-601, 613-614 & n.47.

c. It also is significant that petitioners do not contend that the Uintah Reservation was *entirely* disestablished by the 1905 Act (see Pet. 5; Reply Br. 1 nn. 2, 3), and such a contention would be refuted in any event by subsequent administrative and legislative references to the Reservation (see Pet. 28 nn. 45, 46) and by the 1948 Act, which "define[d] the exterior boundar[ies]" of that Reservation (62 Stat. 72). Petitioners' argument instead is that the Reservation was diminished on a piecemeal basis by the opening of particular tracts to settlement, leaving only the individual allotments and tribal trust land as the remaining Reservation. See Pet. 4, 7, 21-22, 25-28. That contention is inconsistent with *Seymour*, where the Court held that the disposition of surplus lands under the homestead and town-site laws did *not* reduce the Colville Reservation to the checkerboard pattern of trust land that remained. 368 U.S. at 357-359. See also *Solem*, 465 U.S. at 470; *Mattz*, 412 U.S. at 497.

Moreover, in *DeCoteau* and *Rosebud*, the relevant statutes precisely described the areas that were found to have been removed from reservation status.[4] The find-

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Act, which did incorporate a cession agreement (430 U.S. at 605-606, 608-609, 612-613).

[4] In *DeCoteau*, the tribe ceded the entire reservation (420 U.S. at 445), and in *Rosebud*, the three Acts carved off from the reserva-

ing of diminishment in those cases therefore comported with the requirement that "*Congress* [must] clearly evince an 'intent . . . . to change . . . boundaries'" (*Solem*, 465 U.S. at 470, quoting *Rosebud*, 430 U.S. at 615 (emphasis added)). By contrast, Congress did not describe in the 1905 Act the areas of the Uintah Reservation that were to be opened to non-Indian settlement and that, in petitioners' view, were thereby removed from reservation status. Congress instead left the identification of opened lands to the Secretary, after allotment and the setting apart of unspecified lands for forest and reclamation purposes. That approach does not suggest that the 1905 Act itself formally redrew the Reservation's boundaries. On the other hand, the 1888 Act, which concededly *did* remove the Gilsonite Strip from the Uintah Reservation, precisely described the affected territory (Act of May 24, 1888, ch. 310, 25 Stat. 157 *et seq.*), and the 1910 Act, which explicitly extinguished the Indians' interest in the reservoir lands (36 Stat. 285), referred to a precise description of those lands in the Presidential Proclamation of 1905 (34 Stat. 314 (Pet. App. 343a-347a)).

d. Petitioners focus, however, not on the 1905 Act, but on the earlier 1902 Act, which contemplated that unallotted lands on the Uintah Reservation would be "restored to the public domain" (32 Stat. 264). In petitioners' view, the quoted language is "unequivocal language of disestablishment" (Pet. 14) that mandates a finding that the Uintah Reservation was diminished. See Pet. 13-21. There are two flaws in this contention.

First, in *Solem*, the Court held that statutory language indicating that the surplus lands were to be "part of the public domain" was "hardly dispositive" (465 U.S. at 475), explaining that this reference could have meant simply that the lands were opened to settlement (*id.* at 475 n.17). In so ruling, the Court specifically rejected the argument of petitioners Duschesne County and Uin-

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tion lands situated in designated counties (430 U.S. at 585, 597, 608, 613). See also *DeCoteau*, 420 U.S. at 439 & n.22 (listing agreements that removed specifically defined territory).

tah County, who were amici curiae in *Solem*, that a reference to the "public domain" has a talismanic effect that renders it unnecessary to consider other aspects of the statutory text, legislative history, and surrounding circumstances (*id.* at 475 & n.16). The court of appeals therefore did not err in repecting petitioners' identical argument in this case. See Pet. App. 5a, 11a-12a; *id.* at 17a-19a (Seymour, J., concurring). This is not to say that "public domain" language is irrelevant; in some instances, it is highly probative. See *Seymour*, 368 U.S. at 354. The court of appeals simply concluded that here, as in *Solem*, such language is not dispositive.

Second, petitioners ignore the fact that the allotment and restoration provisions of the 1902 Act on which they rely were conditioned upon the Indians' consent (32 Stat. 263-264), which was not forthcoming (Pet. App. 5a). Congress then unilaterally opened the unallotted lands pursuant to the 1905 Act, which did not carry forward the language in the 1902 Act that would have restored those lands to the "public domain." The 1905 Act instead provided that the unallotted lands were to be "disposed of under the general provisions of the homestead and town-site laws of the United States"—language that was held not to effect a disestablishment in *Solem*, *Mattz* and *Seymour*—and the decision below ultimately rests on this substitute language. See Pet. App. 5a-6a, 217a-235a.[5] Moreover, after passage of the 1902 Act upon which petitioners rely, Congress provided for the setting aside of 250,000 acres for a tribal grazing reserve (32 Stat. 744) and directed that the proceeds from timber sales on the forest lands be paid to the Ute Bands (33 Stat. 1070). This recognition of continuing tribal interests on lands other than individual allotments reinforces the conclusion that the 1905 Act did not carry

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[5] In the case of the Navajo Reservation discussed by petitioners (Pet. 12 & n.27) and amicus Santa Fe Mining (Br. 10), the operative opening statute itself specified that the land would be "restored to the public domain." Act of May 29, 1908, ch. 216, § 25, 35 Stat. 457. Here, by contrast, it is the *deletion* of such language that is significant.

forward any prior purpose to effect an immediate and complete surrender of all tribal interests throughout the Reservation. Compare *Solem*, 465 U.S. at 474.[6]

e. Petitioners also err in relying (Pet. 27-30) on some post-1905 references to the "former" Uintah Reservation. Even the dissenting judges in the court of appeals found that the references to the "current" and "former" status of the Reservation "evince[] no discernible Congressional intent one way or the other" (Pet. App. 57a-58a (Seth, J., dissenting)), and the district court reached a similar conclusion based on its thorough review of the record (*id.* at 238a-245a). Compare *Solem*, 465 U.S. at 418-419. Moreover, the references cited by petitioners were made at a time when Indian lands were typically thought to include only those in which Indians held some sort of *property* interest. "Only in 1948 did Congress uncouple reservation status from Indian ownership and statutorily define Indian country to include lands held in fee by non-Indians, within reservation boundaries." *Solem*, 465 U.S. at 468 (citing Act of June 25, 1948, ch. 645, 62 Stat. 757, 18 U.S.C. 1151). In any event, the notion that the Uintah is only a "former" Reservation is conclusively refuted by Congress's statutory confirmation of that Reservation when it added the Hill Creek Extension in 1948.

Similarly, the fact that non-Indians accepted Congress's invitation to settle on the Reservation (see Pet. 21-22) cannot accomplish a disestablishment that Congress did not enact. See, *e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470 (1979) (only 3,074

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[6] Contrary to petitioners' contention (Pet. 26-27), the Presidential Proclamation of July 14, 1905 that opened the Reservation to settlement did not interpret the 1905 Act to restore the land to the public domain and diminish the reservation. The reference in the Proclamation to the "public domain" was merely one part of the recitation in the preamble of the various Acts that preceded the opening. The last mentioned was the 1905 Act, which was accurately described as providing for disposal of the lands under the "homestead and town-site laws" (Pet. App. 332a). Petitioners delete that critical passage from their quotation of the Proclamation.

of the 25,000 residents of the Yakima Reservation are tribal members). Of course, where the non-Indian presence so dominates that the area has lost all Indian character, that eventuality may be some evidence of what Congress intended when it passed the opening legislation. *Solem*, 465 U.S. at 471-472, 480. But in this case, far less than a majority of the land within the Uintah Reservation has passed into private non-Indian hands. In addition, to attach significance to the pattern of settlement would carve out a non-reservation enclave in the middle of the Reservation that would be largely surrounded by land that petitioners concede has retained its reservation status.[7]

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[7] Petitioners rely (Reply Br. 2-3) on the government's brief (at 28) in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), for the proposition that the United States previously has taken the position in this Court that the Uintah Reservation consists only of the land actually held in trust by the United States. The government's brief in that case, however, did not state that the Reservation was so limited; it simply referred to certain trust property "on" the Reservation. Moreover, *Affiliated Ute* did not involve a question of the territorial scope of the Reservation, but only a dispute over property within the Reservation that was held in trust by the United States for the Tribe. See 406 U.S. at 141. The portion of the government's brief to which petitioners refer argued that the suit was barred by sovereign immunity insofar as it was brought against the United States. That discussion obviously had no relevance here. Petitioner's reliance (Pet. 8-9; Reply Br. 2) on the opinion in *Affiliated Ute* is misplaced for essentially the same reasons.

In a stipulation filed in the Court of Claims on January 4, 1954, in *Uintah & White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1 (1957), which concerned the Tribe's claim for additional compensation for certain property, the Bands and the United States stated that the Indians on the Uintah Reservation "received individual allotments thereon pursuant to the Act of May 27, 1902, as amended," and that surplus lands were "restored to the public domain" pursuant to the 1902 Act "and amendments thereto" (Stipulation at 4, 10). That stipulation carries little weight here. The quoted passages do not suggest that the 1902 Act was the sole basis for allotment and opening; to the contrary, they make clear that the substantive provisions of the 1902 Act were "amended." Similarly, the reference to the "public domain" (which does not appear

f. In sum, a number of considerations support the concurrent conclusion by the courts below that the evidence does not establish a sufficiently clear and unequivocal intent by Congress to diminish the Uintah Reservation when it was opened to non-Indian settlement in 1905. That holding does not in any event warrant review by this Court. The en banc court of appeals simply applied the general standards of *Solem* to the particular circumstances of the Uintah Reservation, and its ruling does not present a conflict with state court decisions, as there was in *Solem* (465 U.S. at 466) and *DeCoteau* (420 U.S. at 430-431). The Utah Supreme Court did render a decision almost a decade ago that seemed to assume that these lands were no longer part of the Reservation. *Brough* v. *Appawora*, 553 P.2d 934 (1976). But this Court, at the urging of the United States, vacated that decision and remanded for further consideration in light of *Rosebud* (431 U.S. 901 (1977)), and, as petitioners concede (Pet. 19 n.35), the diminishment issue was not resolved on remand. If the Utah Supreme Court never-

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in the 1905 Act) might have reflected nothing more than a recognition that the lands were opened to non-Indian settlement. See *Solem*, 465 U.S. at 475 n.17. In fact, at a later point in the chronological recitation of legislation pertaining to the Uintah Reservation, the stipulation accurately stated that the 1905 Act provided for opening of the Reservation "under the general provisions of the homestead and town-site laws" and that the 1905 Act "made other changes in the provisions of the 1902 Act for the disposal of unallotted lands" (Stipulation at 12).

The stipulation (*id.* at 15, 17, 23) also referred to the "former Uintah Reservation" when describing lands included in the National Forest or set aside for reclamation purposes. That of course was an accurate description of the reclamation lands, because the 1910 Act extinguished all tribal interests in those lands (see pages 1-2, 10, *supra*). It was not an accurate description of the forest lands. However, as with other such referneces (see page 12, *supra*), that description is inconclusive: because the question of territorial boundaries was not involved; because the distinction between ownership and territorial boundaries was not yet readily apparent (*Solem*, 465 U.S. at 468); and because the stipulation preceded this Court's modern disestablishment decisions, which commenced with *Seymour* in 1962.

theless should adhere to its prior view in some future case, notwithstanding the intervening decision in *Solem* and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review.

Furthermore, there is no reason to believe that non-Indians on the Reservation will be significantly affected by the decision below. Since 1975, when the Tribe adopted the Law and Order Code that precipitated this suit, the Court has made clear that Indian Tribes may not assert criminal jurisdiction over non-Indians (*Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)) and may assert civil jurisdiction over non-Indians on fee land only where they enter into consensual relationships with the tribe or its members or engage in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981). There is no indication that this standard would permit the Tribe to exercise significant authority over non-Indians, because, as petitioners concede (Pet. 5-6, 10-11, 21-22), non-Indians live almost exclusively on fee lands that are removed from tribal concerns. Nor is there any basis for petitioners' assertion (*id.* at 10, 22) that the authority of local governments is "significantly limited" by the holding below. The reservation status of the opened area does not affect the local governments' jurisdiction over non-Indian lands or their inhabitants, and, irrespective of the decision below, those governments do not have jurisdiction over Indian lands or Indians on those lands.

2. a. The en banc court of appeals' holding that the Uintah Reservation was not diminished by the inclusion of 1,010,000 acres in the forest reserve also is consistent with *Solem*. The relevant language of the 1905 Act provided that "before the opening of the Uintah Indian Reservation, the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve * * * such portion of the lands within the Uintah Indian Reservation as he considers necessary" (33 Stat. 1070).

As the en banc majority below observed, "[n]othing in this paragraph amounts to explicit language of cession or a total surrender of Indian interests" (Pet. App. 26a (Seymour, J., concurring)). To the contrary, Congress's directive in the proviso to this section that the proceeds of timber sales from the forest lands be paid to the Indians for the ensuing 15 years (33 Stat. 1070) confirms the continued tribal interests in those lands (Pet. App. 7a), and the Indians were not actually compensated for the forest lands until much later. See Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092 *et seq.*; *Uintah & White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1 (1957). Moreover, because the addition of the lands to the forest reserve was merely an alternative to opening them to non-Indian settlement, and because the opening did not diminish the Reservation, there is no reason to construe the forest reserve provision to have effected a diminishment. It also is relevant that although Congress in 1910 explicitly extinguished all of the Indians' interests in the reclamation lands that were initially set apart pursuant to the same paragraph of the 1905 Act, it did not enact a similar statute extinguishing Indian interests in the forest reserve lands. The court of appeals therefore properly refused to construe the 1905 Act to accomplish that very result (Pet. App. 7a; *id.* at 28a (Seymour, J., concurring)).

b. It is true that the district court, unlike the court of appeals, concluded that the forest reserve lands are not part of the Uintah Reservation. But the district court did not reach that result by application of the analytical framework of this Court's disestablishment cases. Rather, the district court perceived an *inherent* inconsistency between the inclusion of the lands in a forest reserve and their continuation as part of an Indian Reservation (Pet. App. 250a). However, it is the position of the United States, which owns and administers the affected lands, that there is no such inherent inconsistency. That position is entitled to considerable deference by the courts.

The Tribe's property rights in the forest lands of course have been extinguished.[8] Further, the 1905 Act explicitly makes the lands in question "subject to the laws, rules and regulations governing forest reserves" (33 Stat. 1070). It therefore is clear that "Congress intended the lands to be federally *managed* as part of the existing Uintah Forest Reserve" (Pet. App. 29a (Seymour, J., concurring) (emphasis in original)). Accordingly, the Ashley and Uinta National Forests have been and will continue to be managed for public use pursuant to the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.;* the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1601 *et seq.*; and the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*[9] These statutes preempt tribal jurisdiction at least to the same extent that they preempt state jurisdiction (compare 16 U.S.C. 480), and the proceeds of timber sales will continue to be shared with the State, not the Tribe, pursuant to 16 U.S.C. 500. For this reason, and because the forest lands are essentially uninhabited, "Indian tribal jurisdiction over the forest reserve will permit the Tribe to govern its members [to the extent consistent with federal law], but will not greatly affect non-Indians" (Pet. App. 27a (Seymour, J., concurring)). The Indian reservation status of the forest lands therefore is of little practical importance, and petitioners do not contend otherwise. See Pet. 28-29.

C. *Uncompahgre Reservation.* 1. On the surface, the court of appeals' holding that the Uncompahgre Reserva-

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[8] See page 16, *supra*; *Chippewa Indians* v. *United States*, 305 U.S. 479, 481-483 (1939); *United States* v. *Gemmill*, 535 F.2d 1145 (9th Cir. 1976); *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975).

[9] Several hundred thousand acres of the lands in the Ashley National Forest also lie within the High Uinta Wilderness, a component of the National Wilderness Preservation System designated by the Utah Wilderness Act of 1984, Pub. L. No. 98-428, 98 Stat. 1657 *et seq.* See 16 U.S.C. (Supp. II) 1132 note. Those lands are managed pursuant to the Wilderness Act, 16 U.S.C. (& Supp. II) 1131 *et seq.*

tion was not disestablished in 1897 also appears to rest on a plausible application of *Solem*. Thus, although the 1894 Act provided that unallotted lands on the Uncompahgre Reservation were to be "restored to the public domain" (§ 20, 28 Stat. 337), a reference to the "public domain" is not necessarily dispositive under *Solem* (see pages 10-11, *supra*) and that language was not in any event carried forward in the 1897 Act (30 Stat. 87). Of course, as the district court concluded (Pet. App. 182a), the unlimited provision in the 1897 Act for the opening of surplus lands under "all the land laws of the United States" might be viewed as the functional equivalent of the prior language that would have "restored [the land] to the public domain"; but it was not unreasonable for the court of appeals to conclude that the 1897 Act did not contain explicit language of "cession" or reflect a "present and total surrender of Indian interests" (*Solem*, 465 U.S. at 470). See Pet. App. 11a-12a; *id.* at 18a-19a (Seymour, J., concurring). Furthermore, some of the circumstances underlying the passage of the 1897 Act that were relied upon by the court below—*e.g.*, the absence of a cession agreement with the Uncompahgres, the lack of compensation to them, and the failure of non-Indians to flood into the area (*id.* at 9a, 12a-13a; *id.* at 19a-25a (Seymour, J., concurring))—might in another setting require a finding that the reservation was not diminished.

In the end, however, the court of appeals' analysis is unconvincing. In our view, the circumstances of the Uncompahgre Reservation contrast with those of the Uintah Reservation and "reveal a widely held, contemporaneous understanding" that the Reservation would be disestablished by the 1897 Act (*Solem*, 465 U.S. at 471). We therefore adhere to the view expressed in our memorandum in oppositoin to the Tribe's motion to intervene in *Andrus* v. *Utah*, 446 U.S. 500 (1980), discussed by petitioners (Pet. 8 & n.18, 9-10 & n.22, 24-25), that the Uncompahgre Reservation was disestablished in 1897.

As the majority below acknowledged (Pet. App. 20a-21a (Seymour, J., concurring)), the absence of a cession

agreement pertaining specifically to the Uncompahgre Reservation and Congress's failure to compensate the Uncompahgres for the disposition of surplus land to settlers reflect the view that the Uncompahgres, unlike the Uintahs, had only temporary permission to occupy the Reservation until allotments were made to individual members. See also *id.* at 170a-171a & n.89, 182a-183a. That premise undermines the notion that the Uncompahgres had a tribal interest in the Reservation that survived allotment. Moreover, Congress's actions with respect to the Uncompahgre Reservation in fact *were* based on a cession: in the 1880 agreement, the Uncompahgres ceded all of their tribal interests in the Colorado reservation and agreed to accept allotments at a new location (§ 1, 21 Stat. 200). The conclusion that the 1897 Act disestablished the temporary reservation that was set apart to assure the availability of land for those allotments therefore implements the understanding that the Uncompahgres had already given up their claim to a permanent tribal reservation in 1880.

Similarly, the fact that non-Indians did not flood into the Uncompahgre Reservation after opening does not suggest that the area retained an Indian character. The barren lands within the original Reservation have at all times been essentially uninhabited by Indians as well as non-Indians. Indeed, Congress in 1897 authorized allotments to be made to Uncompahgres on the Uintah Reservation because it recognized that the Uncompahgre Reservation did not contain sufficient land of a suitable quality to serve as a permanent home for all of the Uncompahgres. And in fact only 83 allotments were made to Uncompahgres on the latter Reservation, as contrasted with 584 such allotments on the Uintah Reservation. See page 2, *supra*. We do not believe that Congress intended that the Uncompahgres nevertheless would retain a tribal interest in the Reservation after the vast majority of the Uncompahgres left. Cf. *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 358 (1941).

Other factors reinforce this conclusion, including: (i) Congress's 1899 authorization of 83 allotments on the

"former Uncompahgre Indian Reservation" in order to resolve doubts about the validity of such allotments after the April 1, 1898 deadline for opening the Reservation; (ii) Congress's 1948 extension of the Uintah and Ouray Reservation into an area that the 1948 Act referred to as the "former Uncompahgre Indian Reservation" (§ 2, 62 Stat. 77), an unnecessary act if the latter Reservation continued in existence[10]; and (iii) the absence of any acknowledgment by Congress or the Department of the Interior since 1898 that the Uncompahgre Reservation still exists (Pet. App. 182a-186a).

2. Although the court of appeals erred in holding that the Uncompahgre Reservation was not disestablished, we do not believe that review by this Court is warranted. There is no conflict with any state court decision, and the reservation status of the lands is of little practical importance because they are primarily owned by the United States and are largely uninhabited.

Petitioners assert (Reply Br. 4-5), however, that all current federal permits for grazing in the area must be cancelled if the Uncompahgre Reservation has not been disestablished, because the Taylor Grazing Act provides that grazing districts may not be established "in * * * Indian reservations" (43 U.S.C. 315). We disagree, for three reasons. First, the 1948 Act extending the Uintah and Ouray Reservation into the former Uncompahgre Reservation expressly protects the rights of "grazing-district permittees" (§ 1, 62 Stat. 77; see H.R. Rep. 1372, 80th Cong., 2d Sess. 2, 4 (1948)); that specific statute must control over any general exception in the Taylor Grazing Act. Second, the Taylor Grazing Act was passed in 1934, at a time when the term "reservation" might have been thought to refer only to Indian trust lands (see *Solem*, 465 U.S. at 468); the exception in 43 U.S.C. 315 therefore need not be construed to apply to *public*

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[10] The majority of the en banc court of appeals acknowledged that this 1948 extension "seems irreconcilable with continued reservation status" of the original Uncompahgre Reservation (Pet. App. 25a (Seymour, J., concurring)).

lands within the boundaries of an Indian reservation, especially where, as here, virtually no trust land remains.[11] Third, in the Federal Land Policy and Management Act of 1976, 43 U.S.C. (& Supp. II) 1701 *et seq.*, Congress provided for the issuance of permits for grazing on "public lands," a term defined as "any land * * * owned by the United States * * * and administered by * * * the Bureau of Land Management, * * * except * * * lands held for the benefit of Indians" (43 U.S.C. 1702(e)). Because the public lands within the original Uncompahgre Reservation are not held for the benefit of the Ute Tribe, they are available for grazing under 43 U.S.C. 1752.[12]

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[11] We have been informed by the Department of the Interior that it has issued grazing permits on the Zia Indian Pueblo in New Mexico, which also contains public lands.

[12] For similar reasons, the decision below will not affect mining interests on the public lands in the area. In addition, for the reasons stated in our memorandum (at 6-7) in *Andrus* v. *Utah*, *supra*, the reservation status of the land for jurisdictional purposes does not have any effect on the ownership by the State of school sections or other lands within the original Uncompahgre Reservation. There is no anomaly in the presence of state-owned lands in an Indian Reservation (see *National Farmers Union Ins. Co.* v. *Crow Tribe*, No. 84-320 (June 3, 1985), slip op. 1), and in fact Congress recognized in 1948 that the Hill Creek Extension contained approximately 34,000 acres of state-owned land, as well as 3,338 acres of private and county lands. See H.R. Rep. 1372, *supra*, at 2.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, because the United States did not take a position in the court of appeals regarding the status of the original Uncompahgre Reservation, the Court may wish to grant the petition, vacate the judgment below, and remand for further consideration of that issue in light of the views expressed herein.

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No. 85-1821

In The
Supreme Court of the United States
October Term, 1986

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

SUPPLEMENTAL BRIEF OF THE UTE INDIAN TRIBE

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I.

THE CONCLUSION OF THE UNITED STATES THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IS FULLY SUPPORTED BY THE RECORD.

The Ute Indian Tribe agrees with the United States that the petition for a writ of certiorari should be denied. Review by this Court is unnecessary because:

1. Virtually all of the Uintah Reservation national forest and the Uncompahgre Reservation are uninhabited lands, owned by the United States, except that a substantial portion of the Uncompahgre Reservation is made up of Hillcreek Extension Indian lands held in trust by the United States for the benefit of the Ute Indian Tribe. Nothing in the judgment of the court of appeals affects anyone's title.

2. Because the lands are uninhabited, the Ute Indian Tribe can exercise no governmental authority affecting non-Indians. As the United States demonstrates, and the petitioners concede, under this Court's precedents, the Tribe's civil jurisdiction can only be exercised after non-Indians have entered into "consensual relationships" with the Tribe or the Tribe makes an affirmative showing that certain non-Indians are engaging in conduct that "threatens" the economic security, or the health or welfare of, the Tribe. *Montana v. United States,* 450 U.S. 544, 565-566 (1981). Of course, as all parties acknowledge, the Tribe does not possess the power to impose criminal jurisdiction over non-Indians.

3. While the Ute Indian Tribe's civil jurisdiction powers could apply to non-Indians residing within the Uintah

Valley Indian Reservation and doing business with the Ute Indian Tribe, the State of Utah does not consider such a possibility to be troubling, because the State of Utah *declined* to appeal the district court decision upholding the boundaries of the Uintah Valley Reservation .

4. Indeed, the important jurisdictional result achieved by the Ute Indian Tribe in this litigation has very little to do with non-Indians. Rather, the court of appeals' decision permits the Tribe to regulate, in a civil and criminal fashion, tribal member conduct occurring within the Uintah Valley Reservation and the Uncompahgre Reservation. The Tribe will exercise criminal jurisdiction only over its members, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Tribe will be responsible for regulating tribal member activities, including hunting and fishing, *Montana v. United States, supra*, and tribal courts will be available to resolve tribal member disputes. *Williams v. Lee*, 358 U.S. 217 (1959).

The petition for a writ of certiorari should be denied because petitioners have failed to identify any issues of significant practical importance. Furthermore, no party has claimed, let alone demonstrated, that the court of appeals sitting *en banc* failed to consider and apply this Court's disestablishment precedents.

II.

THE TRIBE DISAGREES WITH THE SUGGESTION OF THE UNITED STATES THAT IN THE ALTERNATIVE THE STATUS OF THE UNCOMPAHGRE RESERVATION COULD BE RECONSIDERED BY THE COURT OF APPEALS.

While urging this Court to deny the petition for a writ of certiorari, the United States suggests in the alternative that because the United States had not set forth its views on the status of the Uncompahgre Reservation boundary before the court of appeals, this Court could now ask the court of appeals to reconsider that boundary. This novel suggestion should be rejected. The United States filed three briefs in the proceedings below—one before the district court and two before the court of appeals. If the United States withheld in these three briefs its views on the Uncompahgre Reservation, it did so voluntarily and knowingly. Moreover, the views of the United States relating to the status of the Uncompahgre Reservation first set forth in its memorandum to this Court in *Andrus v. Utah*, 446 U.S. 500 (1980) were well known both to the district court and to the court of appeals. Indeed, the district court in its analysis of the Uncompahgre Reservation, quoted virtually in its entirety the memorandum of the United States actually filed in *Andrus v. Utah, supra.* (Pet. App. 185a n.113).

Hence, reconsideration is not appropriate. The court of appeals knew the views of the United States set out in the district court opinion, considered the governing precedents of this Court, including the most recent decision of *Solem v. Bartlett*, 465 U.S. 463 (1984), and sitting *en banc*

concluded that the relevant acts and legislative history fail to reveal "substantial and compelling evidence of a congressional intention" to diminish the Uncompahgre Reservation boundary. *Id.* at 472.

CONCLUSION

As urged by the United States, the petition for a writ of certiorari should be denied. The State of Utah and its subdivisions have failed to bring to the Court any concrete evidence showing that the court of appeals' decision is incorrect or that the court of appeals' judgment has any negative practical impact upon the Indian and non-Indian residents of northeast Utah.

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Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

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Respondents.

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---

SUPPLEMENTAL BRIEF FOR PETITIONERS

This brief is filed in response to the Brief for the United States as *amicus curiae* expressing the views of the United States in response to the Court's invitation.

The United States agrees with us that the Uncompahgre Reservation ceased to exist nearly a century ago when Congress returned the area to the public domain. The United States does not agree that the original Uintah Reservation was diminished at about the same time. There are but 20,000 people living in these areas and the reservation boundaries are, ac-

cording to the United States, of such little practical importance that certiorari should be denied. We think the Court has been more sensitive to the people affected.[1] Moreover, the federal government incredibly overlooks the fact that hundreds of millions of dollars

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[1] In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Superintendent*, 368 U.S. 351 (1962), there was no conflict in the lower federal or state courts, relatively few people were involved and the land areas were relatively small. The Court nevertheless granted the petitions for certiorari.

Although, as the United States indicates, there is no direct conflict between the decision below and any Utah court (U.S. Brief, at pp. 6, 14, 20), this is only because *Brough v. Appawora*, 553 P.2d 934 (Utah 1976) was vacated and remanded for reconsideration but was never subsequently redecided. 431 U.S. 901 (1977); see Pet. 19. The fact remains, however, that as early as 1910 the Utah courts assumed that the original Uintah reservation had been restored to the public domain and so stated. See *Sowards v. Meagher*, 37 Utah 212, 216-217, 108 P. 1112, 1114 (1910); *Whiterocks Irrigation Co. v. Mooseman*, 45 Utah 79, 82, 141 P.459, 460 (1914). The record also shows that since then neither the State nor local governments treated the area in question as part of the Indian reservation.

are at stake in this case.[2]

This is far from the first reservation boundary case to reach the Court and unless the court of appeals' misreading of *Solem v. Bartlett*, 465 U.S. 463 (1984), is corrected it surely will not be the last.[3] Inevitably none of these cases involves large population centers. But it is always of major consequence to the non-Indians in the disputed area whether their lives will become enmeshed in the intricate web of federal Indian law and Tribal codes governing affairs within

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[2] It is odd for the federal government to oppose certiorari. As to the original Uncompahgre Reservation, the federal government itself petitioned for certiorari in a case involving a mere 10,000 acres within that area; the Court granted the petition and by the time of its decision, nearly $130 million in revenue from oil shale leasing there was at stake. *Andrus v. Utah*, 446 U.S. 500 (1980). This money, which was being held in the district court, was ultimately distributed to the Department of the Interior and a large percentage of it was returned to the State under 30 U.S.C. § 191. The Tribe has claimed that if Uncompahgre is a reservation today all of $130 million and future revenues should be credited to it. See pp. 11-13 *infra*.

In *Appawora v. Brough*, 431 U.S. 901 (1977), the United States thought the question whether the original Uintah Reservation existed undiminished was sufficiently important that the Court should treat Appawora's appeal raising this issue as a petition for certiorari, grant the petition and vacate and remand for consideration in light of *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), which is what the Court did. See Memorandum for the United States as *Amicus Curiae*, in No. 76-815, Oct. Term 1976; see also our Petition here, at p. 19 n. 34.

[3] See Brief for the States of South Dakota, et al., as *Amici Curiae* In Support of Petitioners. In addition to New Mexico, which was also on the Brief, the States of California, Montana, Washington and Wyoming formally expressed a desire to join the Brief after it was filed in this Court.

the boundaries of an Indian reservation. See *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 105 S. Ct. 2447, 2452 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, No. 85-1589, certiorari granted May 27, 1986. This case is no exception and in the discussion that follows we will demonstrate why. We begin, however, with the federal government's position regarding the original Uintah Reservation, a position that not only contradicts what it represented in earlier litigation but also fails to reveal the divergence of views on this subject within the federal government itself.

1. Reservation boundary cases tend to be complex, but our position here is straightforward. Congressional intent, as reflected in the statutory language, is the critical consideration. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977). We have maintained that the unallotted land within the original Uintah Reservation was restored to the public domain pursuant to the 1902 Act (32 Stat. 263), as the President proclaimed shortly after passage of the 1905 Act (33 Stat. 1069). We have further contended that when an area has been restored to the public domain, that area ceases to be part of an Indian reservation.

One cannot tell from the Brief of the United States whether it contests either of these essential propositions. It devotes considerable attention to the 1905 Act, stressing that it incorporated no cession agreement,[4] contained no provisions extending liquor laws

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[4] After *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), one was not needed and the Court held in *Rosebud* that the fact that Congress acted unilaterally "does not have any direct bearing on the question of whether Congress by these later Acts did intend to diminish the Reservation boundaries." 430 U.S. at 587.

or granting school sections,[5] and did not precisely define the lands opened for non-Indian settlement, leaving this to the President's discretion by authorizing him to decide how much of the land should be used for forest and reclamation reserves.[6] U.S. Brief, at pp. 7-10. Without ever having stated its view on whether the disputed area was in fact restored to the public domain in 1905, as we contend, the United States leaves the 1905 Act and turns its attention to the 1902 Act. On that topic, the United States again skirts the issue. It says that when a statute merely contains "a reference to 'public domain' " this is not dispositive (U.S. Brief, at p. 11), which is correct but beside the point in this case. Here we have no mere legislative "reference" to public domain, as in *Solem*, but—and this makes all the difference—actual restoration of the land to the public domain pursuant to statute. The issues posed thus remain unanswered by the federal government's Brief—was the area returned to the public domain and, if so, may it still be regarded as part of the original Uintah Reservation?

The United States was far more precise when it litigated a related case in the Court of Claims against the Ute Indians. *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1 (1957). There it entered into a Stipulation, which it acknowledges for the first time in this lawsuit in a footnote. U.S. Brief, at pp. 13-14 n. 7. This Stipulation, with

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[5] The federal government previously thought these factors had no significance to the reservation issue and so stated in its *amicus* Brief in *Solem v. Bartlett*, at pp. 14 n.14, 16 n.16.

[6] We think this cuts the other way. See pp. 8-9 *infra*.

which the Court of Claims agreed (139 Ct. Cl. at 5-6, 22), quoted the 1902 Act and then succinctly stated the critical point: "Pursuant to this [1902] Act and amendments thereto, more fully set out hereafter, allotments in severalty, aggregating 39,349.84 acres by 1905, were made to the Uintah and White River Indians, and surplus lands (with the exception of the forest reserve and reclamation withdrawals and certain mineral entries) *were restored to the public domain*, and opened for disposition under the public land laws for the benefit of the Indians." See Addendum A to this Brief, at 11a-12a (emphasis added). What is more, the United States (and the Bands) consistently and repeatedly maintained that the original Uintah Reservation was a former reservation (Addendum A, *infra*, at pp. 15a, 16a, 18a, 23a); and throughout its opinion and findings, the Court of Claims also treated the original Uintah Reservation as having ended. *E.g.*, 139 Ct. Cl. at 2, 25, 28,56,64,69,70. No amount of tergiversation by the United States at this late date[7] can change what had

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[7] The United States asserts that its Stipulation "carries little weight here" (U.S. Brief, at p. 13 n.7). The explanation that follows is difficult to comprehend. This is the most we can make of it: that the Stipulation's "restored to the public domain" language was an error. As we argue in the text, we believe the error is in the federal government's new and contradictory position.

The United States also has trouble explaining why it represented Uintah to be a "former" reservation in the Stipulation. It does say that it entered into the Stipulation before 1962, when *Seymour* was decided. But we would have supposed that if the reservation did not exist before then, it does not exist now. Moreover, how the federal government had been treating

been its well-considered (and correct) position on a matter of statutory interpretation. The United States was not alone in its interpretation. President Roosevelt also understood that the disputed area was returned to the public domain, as did the Commissioner of Indian Affairs, the Solicitor of the Department of the Interior, the Committees of Congress, the Tenth Circuit in an earlier decision (*Hanson v. United States*, 153 F. 2d 162 (10th Cir. 1946)), and the panel of the court of appeals in this case (Pet. App. 88a-93a). When the Ute Indian plaintiffs appeared in the Court of Claims they summed it up well: "Now, the Act of May 27, 1902, comes as a matter of particular importance in this suit because that is the Act as amended under which the Uintah Reservation was ultimately broken up."[8]

As we have said, it is not clear whether the United States believes that land returned to the public domain can still be considered to be within an Indian reservation. That was how the court below read *Solem* and we have explained before why it erred in doing so. Pet. 14-15, 18-19. Each of this Court's reservation boundary cases before *Solem* recognized that when an area has been so restored, reservation status ends; on this one point, the Court was unanimous. *See Rosebud*, 430 U.S. at 589 & n.5; *id.* at 618 (Marshall, J., dissenting); *DeCoteau v. District County Court*, 420 U.S. 426-27, 446; *id.* at 463 (Douglas, J., dissenting); *Mattz v. Arnett*, 412 U.S. 481, 504 n. 22 (1973); *Sey-*

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the area is a matter of fact, which neither *Seymour* nor any other decision can alter.

[8] Opening Statement in Testimony for Plaintiff, No. 47569, United States Court of Claims, at page 195 (January 11, 1954) (*Uintah and White River Bands of Ute Indians v. United States*).

mour v. Superintendent, 368 U.S. 351, 354-55 (1962). The Court in *Solem* could not possibly have intended, by one oblique remark citing no authority (465 U.S. at 475), to disagree with these decisions, cast aside two centuries of federal jurisprudence and overrule "one of the fundamental principles underlying the land system of this country" (*Hastings and Dakota Railroad Co. v. Whitney*, 132 U.S. 357, 360-61 (1889)). Indeed, the principle we invoke is so fundamental that it is recited in the Utah Enabling Act of 1894,[9] serves as the foundation for the federal reserve water rights doctrine[10] and is reflected throughout federal land laws, including the laws governing the national forest system.[11] See also *Felix Cohen's Handbook of Federal Indian Law* 209 and n. 19 (1982 ed.) (" 'Public domain' refers to public lands which have not been reserved or set aside for any specific purpose"). If the United States, through its Brief in this case, intends to dispute this point, it is quite simply mistaken.

2. This brings us to the question of the Ashley and Uinta National Forest and the High Uinta Wilderness,

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[9] 28 Stat. 109, quoted in *Andrus v. Utah*, *supra*, 446 U.S. at 502 n.1 ("nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become part of the public domain").

[10] See *e.g.*, *Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose. . . .")

[11] See, *e.g.*, 16 U.S.C. 1609(a) ("no land now or hereafter reserved or withdrawn from the public domain as national forests . . . shall be returned to the public domain except by Act of Congress").

a national forest reserved by President Roosevelt in 1905 from land that had been in the original Uintah Reservation. The treatment of these 1 million acres is significant because, if the original Uintah Reservation was thereby diminished, as we maintain it was, there would be no basis whatsoever for claiming that *any* of the disputed area has retained reservation status since 1905. The President, after all, had complete discretion to choose what portion of the region he wished to reserve for a national forest.

The Brief of United States insists that the forest reserve was then and is today simultaneously part an Indian reservation, an anomaly Congress supposedly intended in 1905. The Forest Service of the United States Department of Agriculture, which has administered this forest reserve throughout this century, has viewed the matter quite differently. In a letter to the Governor of Utah in 1977, which we reprint as an Addendum,[12] the Forest Service stated that this national forest was not part of an Indian reservation, adding that "we believe the original [Uintah] Reservation boundaries were disestablished and the present Reservation boundaries include only the trust lands (Addendum B, *infra*, at 25a, 26a). (That, of course, agrees with what this Court stated in *Affliated Ute Citizens v. United States*, 406 U.S. 128, 141 (1972).)

According to the United States, there is no "inherent inconsistency" in a national forest reserve

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[12] The letter was admitted into evidence. Ex.I-5. However, the Forest Service's Director of Lands testified that he had later been instructed by the Department of Justice not to state any position on the question of reservation boundaries. Tr. 234 (Aug. 2, 1979).

being part of land reserved for an Indian Tribe. U.S. Brief, at p. 16. After saying that, the United States proves just the opposite. It promises that the forest reserve will be administered as if it were not within an Indian Reservation because Indian laws and Tribal jurisdiction will be "preempt[ed]" by the laws governing national forests—in short, that there is indeed a conflict, but that federal forest laws will prevail. We are not so certain. The Ute Tribe, on the basis of its reservation boundary claim, has already insisted upon special hunting and fishing rights within the national forest, "full control of camping and recreation on 989,000 acres," and the right to be consulted regarding all plans of the Forest Service pertaining to "camping, boating, fishing and other forms of public recreation" (Addendum B, *infra*, at 25a, 26a).

Apparently, the United States supports this extraordinary result because the Tribe retained an interest in the land even after it was reserved for a national forest, which is what the court below thought as well. U.S. Brief, at p.16. The United States confuses the matter. To be sure, the Tribe received proceeds from timber sales for fifteen years after 1905 (*id.*), but that does amount any interest in the land itself. The United States should know this as well as anyone. The very point of *Uintah and White River Bands of Ute Indians v. United States*, *supra*, was that in 1905, the United States deprived the Ute Indians of all right, title and interest in the forest lands; it was on this basis that the Court of Claims found that there had been a taking within the meaning of the Fifth Amendment and entered judgment for the Ute Indians against the United States, with interest

from July 1905, the date the forest reserve was created. See 139 Ct. Cl. at 11-12, 97.

3. In saying that the case lacks importance, the United States offers not even a single reason why, with respect to the original Uintah Reservation, the disputed area *ought* to be considered part of an Indian reservation today. Living there are 18,000 non-Indians and very few, if any members of the Ute Tribe. Neither the Tribe nor its members own any appreciable amount of land in the disputed area.[13] If the federal government thinks it is promoting some Tribal interests by its stance in this case, what are those interests? We do not know because the United States never addresses the subject. It did speak out, however, in its *amicus* brief in *Solem v. Bartlett*, and what it then said is worth repeating: "In cases where the opened area of a Reservation was entirely—or almost entirely—sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. . . . Then, as now, it must have seemed artificial to continue to treat as part of Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population ceased to be Indian. . . . All else aside, this explains the result in *Rosebud*. . . . At some point, the tail can no longer wag the dog."[14]

With respect to the original Uncompahgre Reservation, the United States asserts that the reservation

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[13] See Addendum A, at p. 12a; 139 Ct. Cl. at 22; Pet. App. 223a.

[14] Brief for the United States as *Amicus Curiae* Supporting Respondent, at pp.20-21, in *Solem v. Bartlett*, No. 82-1253, Oct. Term 1983.

status of the lands there is "of little practical importance" (U.S. Brief, at p. 20). The United States could not be more mistaken. It is certainly important how hundreds of millions of dollars are distributed. Nearly $130 million had been accumulated from an oil shale leasing program on the two small tracts within the original Uncompahgre Reservation at issue in *Andrus v. Utah*, 446 U.S. 500, 503 n.2 (1980). The Ute Tribe seeking to intervene, contended in this Court that if the original Uncompahgre Reservation still exists, all of this money, which the federal government collected, must be deposited to the credit of the Tribe under 25 U.S.C. § 398b (proceeds from oil and gas leases on Executive Order Indian reservations). Citing this provision, the Tribe also stated that if it could not intervene and if its reservation claim were sustained in this case, it would begin litigation against the federal government "to recapture those funds." Motion for Leave to Intervene, at p. 15, in *Andrus v. Utah*.

All of this is of enormous consequence to the State and to the counties and cities who are Petitioners here. The federal government ultimately prevailed in *Andrus* and received the $130 million. But under 30 U.S.C. § 191, the federal government returns 50 percent of such revenues to the State and, under the same statute, the State gives priority in distributing these funds to the political subdivisions affected. The Uintah basin is extremely rich in oil and gas[15] and

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[15] It has been estimated, for example, that within Uintah County alone there are potential reserves of 1 billion barrels of oil, 2 billion thousand cubic feet of natural gas, and 950-1500 billion barrels of oil in oil shale. See Boettcher & Co., *Prelim-*

at least according to the Tribe's claims, whether the State and its subdivisions continue to receive 50 percent of such revenues turns on the reservation status of the lands.

The United States also asserts that the 18,000 non-Indians in the disputed area will not be "significantly affected by the decision below" because the Tribe will not be permitted to exercise "significant" authority over them. U.S. Brief, at p. 15. We are not so confident. The record shows that the Tribe has already attempted to exercise such significant authority. Its Law and Order Code contains more than 600 sections in 162 pages of closely printed type and asserts detailed authority over all persons living or travelling within the boundaries of its Reservation, wherever those boundaries may be. The Code provides, for example, that all dogs "within any town or city within the exterior boundaries of the Reservation" must be innoculated against rabies within certain intervals and must carry a tag issued by the Tribe (§ 9-1-3(1)). The Tribe has also authorized itself to adopt regulations governing the transportation of any animal "through the Reservation by tourists, common carriers and the like" (§ 9-1-5, 9-1-8). It has issued a detailed traffic code and believes that it may take "non-Indian traffic offender[s]" to State courts for disposition (§ 10-1-4). It has the power, according to its Code, to exclude and remove "persons" from the Reservation who threaten "the peace, health, safety, morals and general welfare of the Tribe," if necessary even without a hearing before the Tribal Court (§§ 3-1-3, 3-1-4).

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inary Official Statement for Uintah County, Utah, General Obligation Refunding Bonds A-9–A-10 (1985).

Perhaps all or some of these and numerous other measures will not ultimately be sustained under the general standard of *Montana v. United States*, 450 U.S. 544 (1981), which the federal government recites. U.S. Brief, at p. 15. On the other hand, the United States is claiming in another case before this Court that a Tribe's civil jurisdiction within its Reservation boundaries is "very broad" and that the "authority to regulate conduct on the reservation is one fundamental aspect of tribal self-government protected by federal policy." Brief For the United States as *Amicus Curiae* Supporting Respondents, at pp. 9-10, in *Iowa Mutual Ins. Co. v. LaPlante*, No. 85-1589, cert. granted May 27, 1986.

One thing, however, is certain. The decision below has condemned the non-Indians in the disputed area and the State and local governments to endless rounds of needless litigation, in State, tribal and federal courts, in order to sort out the details of who regulates what and whom in an area that lost its Indian character nearly a century ago. That, we submit, is a matter of overwhelming "practical importance."

Finally, we welcome the assurances of the United States that Taylor Grazing Act leases will not be cancelled although the Act itself provides otherwise, that the State will continue to share in the proceeds from the national forest (which has more than 400,000 visitor-days per year) even though it is deemed part of an Indian reservation, that mining interests will not be affected, that school sections will not have to be returned and so forth. U.S. Brief, at 17, 20-21 & n.12. But these matters may not be entirely up to the federal government. The courts may have a role. And we cannot help but note that the position the

United States espouses in a court, even this Court, is not always immutable, as this case all too vividly demonstrates.

CONCLUSION

For the foregoing reasons and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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ADDENDUM

ADDENDUM A

No. 47569

No. 47570

THE UINTAH AND WHITE RIVER BANDS OF UTE INDIANS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

STIPULATION

Filed January 4, 1954

IN THE UNITED STATES COURT OF CLAIMS

No. 47569

No. 47570

THE UINTAH AND WHITE RIVER BANDS OF UTE INDIANS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

STIPULATION

It is agreed between the parties, in the above-captioned cases, for the purpose of these cases and no other purpose, as follows:

1. In pre-white times, Indians who have since come to be known as Utes, Southern Paiutes, and Shoshones lived within the territory now included in the State of Utah.

2. By Executive Order of October 3, 1861, (I Kappler 900) the "Uintah Valley" was "reserved to the United States and set apart as an Indian reservation." In the absence of an authorized survey, the area set apart was described as follows:

> ". . . the entire valley of the Uintah River within Utah Territory, extending on both sides of said river to the crest of the first range of contiguous mountains on each side . . ."

The lands which are involved in the above-captioned cases are within the area so described. A copy of the said Executive Order is appended hereto (Appendix A) and incorporated by reference.

3. By an Act of May 5, 1864, (13 Stat. 63) it was provided

> "... That the superintendant of Indian affairs for the Territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uintah Valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same."

A copy of the said Act is appended hereto (Appendix B) and incorporated by reference.

4. By an Act of February 23, 1865, (13 Stat. 432) "... to Extinguish The Indian Title to Lands In The Territory of Utah Suitable For Agricultural And Mineral Purposes [,]" the President was authorized and directed to enter into treaties with the various tribes of Indians of Utah Territory, providing for the surrender of their possessory right to all such lands, except such part as might be set apart for reservations. A copy of the said Act is appended hereto (Appendix C) and incorporated by reference.

5. Pursuant to the Act of February 23, 1865, treaties were negotiated with the "Pie-ede or Pah-Ute" Indians on September 18, 1865 (unpublished), the "Weber Ute" on October 30, 1865, (5 Kappler 698), and various groups of "Utah" Indians on June 8, 9, and 10, 1865 (5 Kappler 695). None of the said treaties was ever ratified.

6. The Indian parties to the treaty negotiated on June 8, 9, and 10, 1865, commonly referred to as the Spanish Fork Treaty, were designated therein as the "... Utah, Yampah Ute, Pah-Vant, Sanpete Ute, Tim-p-nogs and Cum-nm-bah Bands of the Utah Indians occupying the lands within Utah Territory, ..." The said treaty provided for

the cession by said Indians of "all their possessory right of occupancy" to an area described therein, reserving a designated part thereof for their exclusive use and occupation as follows:

> "Art. II. There is however reserved for the exclusive use and occupation of the said tribes the following tract of lands; viz 'the entire valley of the Uintah River within Utah Territory extending on both sides of said river to the crest of the first range of contiguous mountains on each side' which said tract shall be, so far as is necessary, surveyed and marked out, set aside and reserved for their exclusive use and occupation nor shall any white person, unless he be in the employ of the Indian authorities, be permitted to reside upon the same, without permission of the said tribe, and of the Superintendent of Indian Affairs or United States Indian Agent. It is however understood that should the President of the United States hereafter see fit to place upon the reservation, any other friendly tribe or bands of Indians of Utah Territory, to occupy the same in common with those above mentioned, he shall be at liberty to do so.
>
> "Art. III. The said tribes and bands agree to remove to an settle upon the said reservation within one year after the ratification of this treaty, provided the means are furnished them by the United States to enable them to do so—In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied if with the permission of the owner."

A copy of this unratified treaty is appended hereto (Appendix D) and incorporated by reference.

7. From time to time after 1865, various individuals and groups of Indians residing in Utah Territory, other than those who were in Uintah Valley at the time, moved into

the area described in the Executive Order of October 3, 1861, and the unratified Spanish Fork Treaty of 1865, and set apart by the Act of May 5, 1864, *supra.* An Indian agency was established known as the Uintah Valley Agency, and the area became known as the Uintah Indian Reservation or the Uintah Valley Reservation. A substantial number of the said Indians, so located on the reservation, and their descendants since them have continued to live upon the reservation, have received individual allotments thereon pursuant to the Act of May 27, 1902, as amended (see paragraph 16 hereof), and are now all known as Uintah or Uintah Ute Indians. Since 1936 they have been a constituent group of the "Ute Indian Tribe of the Uintah and Ouray Reservation," an Indian Reorganization Act (48 Stat. 984) corporation, composed of Uintah, White River, and Uncompahgre Ute Indians.

8. On March 2, 1868, a treaty was concluded (and subsequently ratified and proclaimed, 15 Stat. 619) between the United States and Indian parties designated therein as "the Tabequache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Utes," "sometimes referred to thereafter as the "Confederated Bands of Ute Indians." Article II of the said treaty set apart a large reservation, wholly within the Territory of Colorado, for the use and occupation of the Indians therein named, and for such other friendly Indians as they might be willing to admit among them. By Article III the Indians, parties thereto, relinquished all claims and rights in and to any other territory not included within the reservation. Article IV provided for the establishment of two agencies upon the reservation, "one for the Grand River, Yampa, and Uintah bands, on White River, and the other for the Tabequache, Muache, Weeminuche, and Capote Bands on the Rio de los Pinos. . ." The said agencies were established and Indians associated with the White River Agency in northwest Colorado came in time to be known as White River Utes or the White River Band of Ute Indians. A

copy of the said treaty of 1868 is appended hereto (Appendix X) and incorporated by reference.

9. By an agreement, approved by the Act of June 15, 1880, (21 Stat. 199), with the "Confederated Bands of Ute Indians in Colorado," it was provided that the Indians would cede the then remaining portions of the Ute Reservation in Colorado. The agreement provided for stated considerations to the Indians and that reservations be established for them, as follows:

> "The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.
>
> "The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.
>
> "The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

A copy of the said Agreement of 1880 is appended hereto (Appendix E) and incorporated by reference.

10. Pursuant to the Agreement and Act of June 15, 1880, supra, the White River Utes were removed to the Uintah Reservation beginning in about November of 1881. Pursuant to the same Act and subsequent legislation they were given individual allotments on the Uintah Reservation, (see Paragraph 16 hereof). In general, the White River Ute Indians so removed to the reservation, and their

descendants since them have continued to live upon the reservation and are a constituent group of the "Ute Indian Tribe of the Uintah and Ouray Reservation."

11. Pursuant to Section 2 of the Act of June 15, 1880, *supra,* a commission reported that it had examined the land on the Grand River near the mouth of the Gunnison, and had found insufficient suitable land for the Uncompahgre Utes. A tract of land in the valleys of the White and Green Rivers in Utah (south and east of the Uintah Reservation) was selected by the said commission and approved by the Secretary of the Interior for the settlement of the Uncompahgre Utes, who removed thereto by October 1881. The Uncompahgre Reservation in Utah was established by Executive Order of January 5, 1882, (I Kappler 901), a copy of which is appended hereto (Appendix F) and incorporated by reference.

12. An Act of May 24, 1888 (25 Stat. 157), a copy of which is appended hereto (Appendix G) and incorporated by reference, provided that a designated portion of the Uintah Valley Indian Reservation should be restored to the public domain and sold upon ratification by three-fourths of the adult-male Indians residing on the reservation. The Act provided further,

> "... That all moneys arising from the sales of this land shall belong to said Indians and be paid into the Treasury of the United States and held or added to any trust funds of said tribes now there."

Pursuant to this Act, lands were sold by the United States and receipts therefrom in the amount of $22,417.93 were credited to the benefit of the Uintah and White River Bands of Ute Indians. Pursuant to the Act of May 27, 1902, (32 Stat. 245, 263), as amended by the Joint Resolution of June 19, 1902, (32 Stat. 744) (see paragraph 17 hereof), an additional $10,000 was appropriated and paid to the Uintah and White River Utes to cover claims for

lands detached from the reservation pursuant to the Act of May 24, 1888, *supra.*

13. An Act of August 15, 1894 (28 Stat. 286, 337) a copy of pertinent portions of which is appended hereto (Appendix H) and incorporated by reference, directed the appointment of a commission (1) to make allotments in severalty to the Uncompaghre Indians within the reservation referred to in paragraph 11, with a provision that the Uncompaghres would be required to pay $1.25 per acre, for the lands so allotted, from out of the proceeds of the sale of their Colorado lands under the 1880 Agreement and Act; and (2) to "negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, . . ." The said commission was appointed but on January 8, 1895, reported that it had encountered difficulty in explaining to the Uncompaghres why they would be required to pay $1.25 per acre for their allotments, whereas the Indians on the Uintah Reservation would not be required to pay for their allotments. As a consequence, no allotments or agreements for cession of unallotted lands were made.

14. The Act of January 7, 1897 (30 Stat. 62, 87), the pertinent provisions of which are appended hereto (Appendix I) and incorporated by reference, directed the Secretary of the Interior to allot in severalty, to the Uncompahgre Ute Indians on the Uncompahgre Reservation, lands in the Uncompahgre Reservation, or the Uintah Reservation, or elsewhere in the State of Utah, and provided for the disposition of unallotted lands on the Uncompahgre Reservation under the public land laws. Pursuant to said Act, and the Act of June 4, 1898, (30 Stat. 429) (see paragraph 15 hereof), and the Joint Resolution of June 19, 1902 (32 Stat. 744) amending the Act of May 27, 1902 (32 Stat. 245, 263) (see paragraphs 16

and 17 hereof), Uncompahgre Indians were given allotments in severalty upon the Uncompahgre and Uintah Reservations, including ultimately 63,915.51 acres in allotments on the Uintah Reservation by 1905, and the unallotted portions of the Uncompahgre Reservation were opened for disposition under the public land laws. By the Act of May 27, 1902 (32 Stat. 245, 263), as amended by the Joint Resolution of June 19, 1902, (32 Stat. 744), (see paragraphs 16 and 17 hereof), the United States appropriated and paid to the Uintah and White River Utes, $60,064.48 which had been received from the Uncompahgres for allotments on the Uintah Reservation.

15. An Act of June 4, 1898, (30 Stat. 429) a copy of which is appended hereto (Appendix J) directed and authorized the President to appoint a commission to make allotments in severalty, with the consent of the Indians properly residing on Uintah Indian Reservation, "to the said Indians and to such of the Uncompahgre Indians as may not be able to obtain allotments within the Uncompahgre reservation," and also provided,

> "Sec. 2. That said commission shall also obtain, by the consent of a majority of the adult male Indians properly residing upon and having an interest in the said Uintah Indian Reservation, the cession to the United States of all the lands within said reservation not allotted or needed for allotment as aforesaid. The agreement for such cession shall be reported by said commission and become operative when ratified by Act of Congress; and thereupon such ceded lands shall be held in trust by the United States for the purpose of sale to citizens thereof: *Provided,* That the United States shall pay no sum or amount whatever for said lands so ceded. Said lands shall be sold in such manner and in such quantities and for such prices as may be determined by Congress: *Provided,* That the amounts so received shall, in the aggregate be sufficient to pay said Indians in full the amount agreed

upon for said lands. All sums received from the sales of said lands shall be placed in the Treasury of the United States for said Indians, and shall be exclusively devoted to the use and benefit of the Indians having interests in the lands so ceded.

16. The Act of May 27, 1902, (32 Stat. 245, 263), a copy of the pertinent portions of which is appended hereto (Appendix K) and incorporated by reference, provided for individual allotments and disposition of unallotted lands on the Uintah Reservation, as follows:

"That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further,* That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the min-

ing laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

"Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

Pursuant to this Act and amendments thereto, more fully set out hereafter, allotments in severalty, aggregating

39,349.84 acres by 1905, were made to the Uintah and White River Indians, and surplus lands (with the exception of forest reserve and reclamation withdrawals and certain mineral entries) were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians. Substantial amounts of said surplus lands were sold, and $1,184,996.33 in proceeds from such sales was set up for the benefit of the Indians under an account headed "Proceeds of Uintah and White River Ute Lands." By Order of the Secretary of the Interior, August 25, 1945 (10 F.R. 12409), a copy of which is appended hereto (Appendix L) and incorporated by reference, all undisposed-of opened lands of the former Uintah Reservation were "restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah. . ."

17. A Joint Resolution of June 19, 1902 (32 Stat. 744), a copy of the pertinent portions of which is appended hereto (Appendix M) and incorporated by reference, supplemented and modified the Act of May 27, 1902, *supra.* The Resolution provided that,

> "In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of livestock.
>
> "All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other

> Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named."

The Resolution also provided that the $70,064.48 previously appropriated by the Act of May 27, 1902, *supra*, in satisfaction of claims of the Uintah and White River Tribes of Ute Indians, as set forth in the Act (see paragraphs 12, 14, and 16 hereof), should be paid without awaiting the action of the Indians upon the program of allotments and disposition of unalloted and unreserved lands proposed by the Act of May 27, 1902, *supra*.

18. An Act of March 3, 1903 (32 Stat. 982, 997-8), a copy of the pertinent provisions of which is appended hereto (Appendix N) and incorporated by reference, provided,

> ". . . That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their land as directed by the Act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said Act: . . ."

19. The Act of March 3, 1905 §33 Stat. 1048, 1069-1070), a copy of the pertinent provisions of which is appended hereto (Appendix O) and incorporated by reference, extended the time for opening the Uintah Indian Reservation, provided generally for the disposition of unreserved and unallotted lands under the general provisions of the

homestead and town-site laws, the proceeds to be used for the benefit of the Indians, made other changes in the provisions of the 1902 Act for the disposal of unallotted lands, and provided for reservation of forest lands and reservoir sites prior to opening, as follows:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the Act opening the reservation."

20. Pursuant to the authority granted by the Act of March 3, 1905, *supra*, approximately 1,010,000 acres of land within the Uintah Indian Reservation (more fully described hereafter) were added to and made a part of the Uintah Forest Reserve, by Proclamation of the President on July 14, 1905, (34 Stat. Pt. III 3116). A copy of said proclamation is appended hereto (Appendix P) and incorporated by reference. Quantities of timber were sold from time to time from off such lands prior to 1920, and, pursuant to the the Act of March 3, 1905, *supra*, $63,024.83 in proceeds therefrom was transferred to accounts for the benefit of the Indians, as follows: $62,724.83 to an account "Proceeds of Uintah and White River Ute Lands," and

$300 to an account "Indian Moneys Proceeds of Labor, Uintah and Ouray Indians."

21. Pursuant to the authority granted by the Act of March 3, 1905, *supra*, approximately 93,000 acres of land in the Uintah Indian Reservation were reserved for "reservoir site necessary to conserve the water supply for the Indians, or for general agricultural development," by proclamation of the President on August 3, 1905, (34 Stat. Pt. III 3141). By Proclamation of August 14, 1905, the reservation was modified by excluding certain lands, thereby reducing the reservation to approximately 60,160 acres. The said Proclamations are appended hereto (Appendix Q) and incorporated by reference. By orders of May 13, 1907, and November 11, 1909, copies of which are appended hereto [Appendix R] and incorporated by reference, 56,868.51 acres of the 60,160 acres theretofore reserved by the above Proclamations, were withdrawn, by the Secretary of the Interior pursuant to Section 3 of the reclamation Act of June 17, 1902 (32 Stat. 388), for irrigation works for the Strawberry Valley project.

22. By the Act of April 4, 1910, (36 Stat. 269, 285), a copy of the pertinent portions of which is appended hereto (Appendix S) and incorporated by reference, Congress extinguished "All right, title and interest of the Indians" in the "lands in the former Uintah Indian Reservation in the state of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nineteen hundred and five, xxx and which were by the Secretary of the Interior withdrawn for irrigation works under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, in connection with the reservoir for the Strawberry Valley project." The area embraced within the above description constitutes 56,868.51 acres (see paragraph 21 hereof), more fully described in paragraph 26 hereof, and is the subject of the claim for just compensation in Docket No. 47570. The said Act of April 4, 1910, *supra*, appropriated $1.25

per acre for the lands thus taken to be paid from the reclamation fund "for the benefit of the Uintah Indians," subject to the same disposition as the proceeds of sales of lands in the former Uintah Indian Reservation, and payable in five annual installments. Pursuant to this Act, $71,085.65 was paid into the Treasury under the fund "Proceeds of Uintah and White River Lands," in five equal installments of $14,217.13 on February 21, 1912, October 28, 1912, June 27, 1913, September 22, 1914, and February 25, 1915, respectively. Under date of October 18, 1948, the Acting Commissioner of Indian Affairs, in response to a Call of this Court, reported that rentals or income from the said lands were collected between August 3, 1905, and April 4, 1910, and were paid or credited to plaintiffs, as follows: January, 1908, $10,408; September, 1908, $8,728; September, 1910, $9,945.88.

23. By an order of October 20, 1910, a copy of which is appended hereto (Appendix T) and incorporated by reference, six sections of unallotted lands within the former Uintah Indian Reservation were withdrawn from public entry, pursuant to the reclamation Act of June 17, 1902, *supra*, in connection with the Strawberry Valley reclamation project. The said lands are Sections 13, 14, 23, 24, 25 and 26, Township 4 South, Range 11 West, Uintah Special Meridian. Section 25 was within the area previously added to the Uintah National Forest by the Proclamation of March 3, 1905, *supra* (see paragraph 20 hereof). Sections 13, 14, 24, 25 and 26 were within the 60,160 acres set aside for reservoir and other purposes by the Proclamation of August 3, 1905, *supra* (see paragraph 21 hereof), and constitute the balance of that area not taken by the Act of April 4, 1910, *supra*, (see paragraph 22 hereof). Such right, title, and interest as plaintiffs may have had to the said Sections 13, 14, 23, 24, and 26 has not been (Tr. 184) extinguished, and no claim with reference to the said lands is included in either Docket No. 47569 or 47570. Said Section 25 was added to and made

a part of the Uintah Forest Reserve by the Proclamation of July 14, 1905, *supra*, pursuant to the Act of March 3, 1905, *supra* (see paragraphs 19 and 20 hereof), and the claim for just compensation based upon the said Section 25 is included in Docket No. 47569.

24. The Act of February 13, 1931, (46 Stat. 1092), a copy of which is appended hereto (Appendix U) and incorporated by reference, provided for payment for 973,777 acres of the 1,010,000 acres of land added to the Uintah National Forest on July 14, 1905 (see paragraph 20, *supra*), in the following terms:

> ". . . That there is hereby authorized to be appropriated the sum of $1,217,221.25 for payment, at the rate of $1.25 per acre, to the Uintah, White River, and Uncompahgre bands of Ute Indians in the State of Utah for nine hundred and seventy-three thousand seven hundred and seventy-seven acres of land belonging to such Indians being a part of the one million and ten thousand acres of land withdrawn from entry and sale by an Executive Order dated July 14, 1905, and included within the Uintah National Forest. Such sum shall be in full satisfaction of all claims of said Indians against the United States with respect to such lands and shall, when appropriated, be apportioned by the Secretary of the Interior among the said bands of Indians in such amounts as in his opinion the interests of said bands require: *Provided*, That as to the balance of said one million and ten thousand acres, amounting to thirty-six thousand two hundred and twenty-three acres, which has heretofore been classified as coal lands, the Secretary of the Interior shall proceed with all convenient speed to ascertain the value thereof and report his findings with respect thereto to the Congress not later than six months after the approval of this Act for such action as to the Congress shall seem appropriate. The amounts so apportioned, less the amount of the attorneys' fees

determined as provided in section 2, shall be credited to such bands on the books of the Treasury Department, shall bear interest at the rate of 4 per centum per annum and shall be disposed of in the same manner as now or hereinafter provided by law for the disposition of other funds belonging to said Indians."

Pursuant to said Act, $1,217,221.25 was set up on the books of the United States Treasury under the heading "Payment to Uintah, White River, and Uncompahgre Ute Indians of Utah for Lands." After payment of attorneys fees, $1,162,221.25 of said amount was transferred to the "Uintah, White River and Uncompahgre Ute 4% Fund, Utah", $1,146,319.50 of said funds was distributed *per capita* to the Uintah, White River, and Uncompahgre Bands of Ute Indians in the years 1935, 1936, and 1938. It is stipulated that for purposes of case No. 47569 Uncompahgre Indians received the benefit of $\frac{430}{1191}$ of the proceeds of the Act of February 13, 1931, *supra*.

25. The area of the former Uintah Reservation which was added to the Uintah National Forest by Proclamation of July 14, 1905, *supra*, and in payment for which $1.25 per acre was appropriated by the Act of February 13, 1931, *supra*, being the area for the taking of which just compensation is sought in No. 47569, constitutes 973,777 acres, and is described as follows:

Beginning at the northeastern most point of the former Uintah Indian Reservation; thence in a southerly direction down the eastern boundary of the said Reservation to the section line between Sections twenty-one (21) and twenty-eight (28), Township two (2) North, Range one (1) East, Uintah Meridian; thence westerly to the south-west corner of Section nineteen (19), Township two (2) North, Range one (1) West; thence northerly to the south-east corner of Section thirteen (13), Township two (2) North, Range two (2) West; thence westerly to the south-west corner of said

section; thence northerly to the north-west corner of Section twelve (12), said township; thence westerly to the south-west corner of Section four (4), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section four (4), Township two (2) North, Range three (3) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence westerly to the north-east corner of Township one (1) North, Range six (6) West; thence southerly to the south-east corner of Section thirteen (13), said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said section; thence westerly to the south-west corner of Section eleven (11), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section eight (8), said township; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the north-east corner of Section twenty-one (21), Township one (1) North, Range nine (9) West; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section nineteen (19), said township; thence southerly along the range line, allowing for the proper offset on the Base Line, to the north-west corner of Section eighteen (18), Township one (1) South, Range nine (9) West; thence easterly to the north-east corner of Section sixteen (16), Township one (1) South, Range eight (8) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence westerly to the north-east corner of Section four (4), Township two (2) South, Range ten (10) West; thence southerly to the south-east corner of Section sixteen (16), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Township two (2) South, Range eleven (11) West; thence westerly to the south-west corner of Section thirty-three (33), said township; thence northerly to the south-east cor-

ner of Section twenty (20), said township, thence westerly to the south-west corner of said section, thence northerly to the south-east corner of Section seven (7), said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said township; thence westerly to the north-east corner of fractional Section four (4), Township two (2) South, Range twelve (12) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence easterly to the north-east corner of Section three (3), Township three (3) South, Range twelve (12) West; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section eleven (11), said township; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section thirteen (13), said township; thence southerly to the south-east corner of Township four (4) South, Range twelve (12) West; thence easterly to the south-west corner of Section eleven (11) West; thence northerly to the north-west corner of said section; thence easterly to the south-west corner of Section twenty-five (25), said township; thence northerly to the north-west corner of said section; thence easterly to the north-east corner of Section thirty (30), Township four (4) South, Range ten (10) West; thence southerly to the south-east corner of Section thirty-one (31), said township; thence easterly to the south-west corner of Township four (4) South, Range nine (9) West; thence northerly to the north-west corner of Section thirty (30), said township; thence easterly to the north-east corner of Section twenty-five (25), said township; thence southerly to the south-east corner of said township; thence easterly to the north-east corner of Section five (5), Township five (5) South, Range eight (8) West; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Section twenty-four (24), Township five (5) South, Range nine

(9) West; thence westerly to the north-east corner of Section twenty-eight (28), said township; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section twenty-nine (29), said township; thence southerly to the north-west corner of Section twenty-nine (29), Township six (6) South, Range nine (9) West; thence easterly to the south-west corner of Section twenty-one (21), Township six (6) South, Range eight (8) West; thence northerly to the north-west corner of Section four (4), said township; thence easterly to the eastern boundary of the Uintah Indian Reservation; and thence along the said Indian Reservation boundary, first in general southwesterly, then a westerly, then a northwesterly and north, and then an easterly direction back to the point of beginning;

Excepting therefrom approximately 36,223 acres, classified as coal lands, and more particularly described as follows:

Township 1 south, range 8 west, Uintah meridian, Utah: North half, and the north half of the south half of section 16; section 17; lots 2, 3, and 4, and the southeast quarter of the northwest quarter, and the east half of the southwest quarter, and the northeast quarter of the northeast quarter, and the south half of the northeast quarter, and the southeast quarter of section 18; lot 1, and the northeast quarter of the northwest quarter, and the north half of the northeast quarter of section 19.

Township 1 south, range 9 west, Uintah meridian, Utah; Southeast quarter of the northeast quarter, and the south half of section 13; south half of the south half of section 14; south half of the south half of section 15; the northwest quarter of the southwest quarter, and the south half of the south half of section 16; southwest quarter of the northeast quarter, and the south half of the northwest quarter, and the south half of section 17; section 18; lots 1, 3, and 4, and the northeast quarter of the northwest

quarter, and the east half of the southwest quarter, and the north half of the northeast quarter, and the southeast quarter of section 19; section 20; section 21; section 22; section 23; north half and the southwest quarter, and the northwest quarter of the southeast quarter of section 24; the northwest quarter of the northwest quarter of section 25; the north half of section 26; north half of section 27; the north half of section 28; the north half and the east half of the southwest quarter and the north half of the southeast quarter of section 29; lots 1, 2, and 3, and the east half of the northwest quarter, and the northeast quarter of section 30.

Township 1 south, range 10 west, Uintah meridian, Utah: The south half of the south half of section 10; the south half of the south half of section 11; the south half of the south half of section 12; section 13; section 14; section 15; section 16; the northeast quarter and south half of the northwest quarter, and the south half of section 17; the southeast quarter of the northeast quarter, and the southeast quarter of the southwest quarter, and the southeast quarter of section 18; section 19; section 20; section 21; section 22; section 23; section 24; the north half and the north half of the south half of section 25; section 26; section 27; section 28; section 29; the east half and lots 1, 2, 3, and 4, and the east half of the west half of section 30; lots 1, 2, 3, and 4, and the east half of the west half and the east half of section 31; section 32; the north half and the north half of the southwest quarter of section 33; the northeast quarter of the northeast quarter, and the west half of the northeast quarter, and the northwest quarter of section 34; the north half of the north half of section 35.

Township 1 south, range 11 west, Uintah meridian, Utah: Lots 1, 2, 3, and 4, and the east half of the west half, and the southeast quarter of section 18; section 19; the northwest quarter of the northwest quarter and the south half of the northwest quarter and the southwest quarter

and the west half of the southeast quarter of section 20; the east half and the the east half of the northwest quarter and the northeast quarter of the southwest quarter of section 25; the west half of the southwest quarter and the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section 28; section 29; section 30; the northeast quarter, and lots 1, 2, 3, and 4, and the east half of the west half, and the southeast quarter of section 31; section 32; section 33; section 34; the west half of section 35; the northeast quarter and the east half of the southeast quarter of section 36.

Township 1 south, range 12 west, Uintah meridian, Utah: Lots 1, 2, 3, and 4, and the south half of the south half of section 12; section 13; section 24; the northeast quarter, the northwest quarter, and the southeast quarter of section 25.

Township 2 south, range 10 west, Uintah meridian, Utah: Section 4, section 5; section 6; section 7; section 8; section 9.

Township 2 south, range 11 west, Uintah meridian, Utah: Lots 3 and 4 of section 2; lots 1, 2, 3, and 4, and the south half of the north half and the south half of section 3; lots 1, 2, 3, and 4, and the south half of the north half and the south half of section 4.

26. That area of the former Uintah Reservation reserved for reservoir and other purposes by Proclamations of August 3 and August 4, 1905 *supra*, and withdrawn for the Strawberry Valley reclamation project by orders of May 13, 1907, and November 12, 1909, as to which all right, title, and interest of the Indians was extinguished by the Act of April 4, 1910, *supra*, being the area for the taking of which just compensation is sought in No. 47570, constitutes 56,868.51 acres and is described as follows:

Uintah Special Meridian. Section 18, 19, 29, 30, 31 and 32, Township 2 South, Range 11 West;

Sections 1 to 36 inclusive, Township 3 South, Range 11 West;

Sections 1 to 12, inclusive, 15 to 22, inclusive, and Sections 27 to 32, inclusive, Township 4 South, Range 11 West;

Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35, 36, Township 2 South, Range 12 West;

Sections 1, 2, 12, Township 3, South, Range 12 West.

/s/ ERNEST L. WILKINSON
ERNEST L. WILKINSON
Attorney of Record for Plaintiffs

/s/ PENNY W. MORTON
Assistant Attorney General

/s/ FLOYD L. FRANCE
Attorney for the United States

ADDENDUM B

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOREST SERVICE
324 25th Street
Ogden, Utah 84401

APR 8 1977

Honorable Scott M. Matheson
Governor of Utah
State Capitol
Salt Lake City, Utah 84114

Dear Governor Matheson:

We have reviewed the Ute Indian Tribe Resolution, 76-125, and Discussion Draft Agreement Between the State of Utah and the Ute Tribe on Civil and Criminal Jurisdiction dated March 25, 1977. There are certain sections in the Resolution and the draft Agreement which would affect the management of portions of the Ashley, Uinta, and Wasatch National Forests. We appreciate your consideration of our concerns relating to these sections.

The Indian Resolution essentially proposes, in items 10 and 11, to give certain property and jurisdictional rights vested in the State of Utah and the United States within the original exterior boundary of the Uintah and Ouray Reservation to the Ute Indian Tribe. It is proposed in item 11 that the Ute Indian Tribe be given hunting and fishing rights without regard to State laws and in item 10 full control of camping and recreation on 989,000 acres of National Forest land which they have related to the Central Utah Project.

The National Forest lands included within the original exterior boundary of the Uintah and Ouray Reservation provide a wide range of goods and services to the public.

Recreation use of this area, which includes 6 reservoirs and 31 lakes which will be stabilized, is and will be heavy. Much of the High Uintas Primitive Area is also encompassed within the boundary. Over 400,000 visitor days of use were recorded during 1975. Some of the recreation areas within this boundary now or to be constructed are the Strawberry, Current Creek, Whiterocks, and Upper Stillwater Reservoirs.

Under Definitions, item (d), non-trust lands; item (e), original exterior boundaries, and the comments under item 3, *Present Conflict*, we believe that the original Reservation boundaries were disestablished and the present Reservation boundaries include only the trust lands. The Act of March 3, 1905 (33 Stat. 873, 1070), authorized the establishment of the Uinta National Forest, which was accomplished by Presidential proclamation on July 14, 1905. The Presidential proclamation removed the lands from the Uintah and Ouray Reservation and placed them within the Uinta Forest Reserve to be subject to laws, rules, and regulations governing Forest Reserves. On February 13, 1931, Congress appropriated the sum of $1,217,221.25 to be paid to the Ute Indian Tribe for full satisfaction for lands taken in 1905, except for 36,223 acres which had been classified as coal lands. Public Law 84-717 under the Act of July 14, 1956, provided for settlement of the claims on the remaining 36,223 acres. Pursuant to formal stipulation of the parties, a consolidated judgment was entered by the Court of Claims for this case, No. 47569, and four vested cases No. 87568, 47510, 47511, and 47572, in favor of the plaintiffs and against the defendants in the amount of $3,250,000 in full settlement of all claims arising out of the five cases. Through these actions jurisdiction and tribal claims to the lands within the National Forest were disposed of and all rights, title, and interests to the lands were acquired by the United States. Since all of the Indian rights to these lands were acquired by the United States, there is no basis for considering them as part of the Re-

servation. The boundaries of the Reservation would be in common with the exterior National Forest boundaries established by the 1905 proclamation and would not extend to the boundaries as established by Executive Order of October 3, 1861.

Item 3, *Present Conflict,* would provide the Tribe certain jurisdictional protections on non-trust lands where vital Indian interests are at stake. We believe the Agreement is referring to the hunting and fishing rights of tribal members as indicated under items 4 and 5. Item 4 states that the Ute Indian Tribe, "shall have the right to hunt, fish, boat, and trap within the original exterior boundaries of the Uintah and Ouray Reservation" and, "In addition, the Tribe agrees to regulate hunting, fishing, and trapping practices of the members of the Tribe so as to insure the maintenance of a proper biological balance between populations and available habitat. . . ." It further provides, "that all leases of such public lands entered into after the date of this Agreement shall recognize the hunting and fishing rights of tribal members free from any such consent or permission by the lessee."

The only reference we have been able to find concerning rights of the Indians to hunt and fish is in the unratified treaty of June 8, 1865, and October 30, 1865, which included the Utah Yampah Ute, Pah-vant, Sanpete Ute, Trim-p-nogs, and Cum-nm-bah Bands of the Utah Indians. Article 1 of this treaty indicates that the Indians would surrender and relinquish to the United States all their possessory rights of occupancy in the lands claimed and occupied by them within the areas of the thirty-eight and forty-first parallel in Utah. This area includes the width of the State and extends southward from approximately the south boundary of Wyoming to the thirty-eight parallel, which is approximately twenty miles north of Cedar City. Article IV of this unratified treaty states, "The right of taking fish at usual and accustomed grounds and stations is further reserved to said Indians in common with all

white citizens of the Territory and of erecting temporary houses for the purpose of curing them, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands."

This unratified treaty would indicate that the fishing and hunting rights of the Ute Tribe could include approximately 75 percent of the State of Utah. If the State recognizes the Tribe's rights to hunt and fish within the 1861 reservation boundaries on the 989,000 acres on which all rights were acquired from the Indian Tribe, then it is possible the Tribe could assert an even stronger claim to hunting and fishing rights to the lands described in the 1865 unratified treaty.

Item 4 provides that all leases of public land entered into after the date of the Agreement shall recognize the hunting and fishing rights of tribal members free from any consent or permission by the lessee. Item 6 provides, "The parties recognize their mutual interest in protecting environmental values from damage that might result from uncontrolled growth of public recreational facilities within the original exterior boundaries of the Reservation. The parties therefore agree that the United States shall consult with the State and the Tribe on all plans, construction, developments, and operations of facilities within the original exterior boundaries of the Reservation pertaining to camping, boating, fishing, and other forms of public recreation." These items should either be deleted from the Agreement or modified to pertain only to tribal lands. The United States through the Secretary of Agriculture and the Forest Service is responsible for the administration of the National Forest lands, which includes the development of recreation facilities. These rights cannot be subordinated or diminished through agreement between the State and the Ute Indian Tribe. The only way these rights can be transferred to the Indian Tribe is by an Act of Congress or adjudication in a Federal Court.

We appreciate the opportunity to provide this information. We want to fully participate in any further deliberations on these issues.

Sincerely,

/s/ VERN HAMRE
VERN HAMRE
Regional Forester

(9)

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NOV. 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1821

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF UTAH, ET AL., PETITIONERS

v.

UTE INDIAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
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Washington, D.C. 20530
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15pp

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The Solicitor General, on behalf of the United States as amicus curiae, respectfully moves for leave to file the attached supplemental memorandum on behalf of the United States as amicus curiae.

This case presents the question whether the Uncompahgre and Uintah Indian Reservations in Utah were disestablished or diminished by various Acts of Congress adopted around the turn of the Century. The Court invited the Solicitor General to file a brief expressing the views of the United States, and we filed our brief on November 10, 1986. The United States takes the position in that brief (i) that the court of appeals correctly held that the Uintah Reservation was not dismissed in 1905 by the opening of certain unallotted lands to non-

Indian settlement and the inclusion of other such lands in a forest reserve, and (ii) that the court of appeals erred in holding that the Uncompahgre Reservation was not disestablished by the Act of June 7, 1897, ch. 3, 30 Stat. 62 *et seq.* However, we also take the position in our amicus brief that the question of the status of the Uncompahgre Reservation does not warrant plenary review by this Court because there is no conflict with state court decisions and because the court of appeals' holding is of little practical importance, since the lands within the boundaries of the original Uncompahgre Reservation are primarily owned by the United States and are largely uninhabited. See U.S. Amicus Br. 20-21.

On November 21, 1986, petitioners filed a supplemental brief in response to the brief of the United States. In their supplemental brief, petitioners argue that the court of appeals' holding as regards the Uncompahgre Reservation warrants review because "hundreds of millions of dollars" are at issue in this case (Pet. Supp. Br. 2-3, 11-12). The premise of this assertion is that the holding below might entitle the Tribe to receive the proceeds of the oil and gas leasing of federally owned lands in the Reservation pursuant to 25 U.S.C. 398b, and thus preclude the State from continuing to share in those proceeds, as it currently does under the Mineral Lands Leasing Act, 30 U.S.C. 191. Petitioners assert that, "incredibly," the United States "overlooks" that consequence (Pet. Supp. Br. 2-3). If indeed that would be the consequence of the court of appeals' holding as regards the Uncompahgre Reservation, then petitioners overlooked it as well, because they made no mention of this point in their certiorari petition or reply brief. In our view, however, as we explain in the attached memorandum, the State will continue to be entitled to receive its share of revenues under 30 U.S.C. 191—and the Tribe will not be entitled to any portion of those revenues under 25 U.S.C. 398b—if the court of appeals' holding that the Uncompahgre Reservation continues to exist is permitted to stand.

Because the Court invited the Solicitor General to file a brief expressing the views of the United States, and because we had no occasion in that brief to address the issue of mineral revenues, we believe the Court may wish to have the views of the United States on this issue as well.

For the foregoing reasons, we respectfully request that the motion for leave to file the attached supplemental memorandum be granted.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1821

STATE OF UTAH, ET AL., PETITIONERS

v.

UTE INDIAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Petitioners argue in their supplemental brief in response to the brief filed on behalf of the United States as amicus curiae that "hundreds of millions of dollars" may turn on the status of the Uncompahgre Reservation. Petitioners submit that, if the original Uncompahgre Reservation was not disestablished, the Tribe might claim all revenues from oil and gas leasing on federal lands within the original boundaries of the Reservation under 25 U.S.C. 398b and that the State accordingly should no longer receive 50% of those revenues under 30 U.S.C. 191. See Pet. Supp. Br. 2-3, 11-12. In petitioners' view,

this possible consequence indicates that the Court should grant review of the court of appeals' holding that the Uncompahgre Reservation was not disestablished in 1897.

Petitioners do not actually take the position that the Tribe will receive all royalties, bonuses, and other income from such leasing, and indeed petitioners presumably would argue otherwise if the Tribe actually filed suit to establish a right to receive those revenues. Their concern is only that the Tribe might *claim* such a right in some future lawsuit, as it did in its motion to intervene (at 14-15) in *Andrus* v. *Utah*, 446 U.S. 500 (1980). In our view, any such claim by the Tribe would be without merit. The statutory allocation of the revenues realized by the United States from mining on lands to which the United States holds absolute title, and in which the Tribe has no beneficial interest, is in no way affected by whether those lands are within the original boundaries of an undiminished Indian Reservation—just as the location of other non-Indian lands within the boundaries of an Indian reservation does not entitle the Tribe to a share of the royalties and other income from mining on those lands.

1. Section 1 of the Mineral Lands Leasing Act of 1920, as codified at 30 U.S.C. 181, provides that "[d]eposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite * * * or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this chapter * * *." There are express exceptions in Section 1 for mineral lands "in incorporated cities, towns, and villages and in national parks and monuments," and for "lands within the naval petroleum and oil-shale reserves"; but there is no such exception for mineral lands owned by the United States that are situated within the boundaries of an Indian reservation. It follows that lands and mineral deposits within the original boundaries of the Uncompahgre Reservation that are "owned by the United States" are subject to leasing under the Mineral

Lands Leasing Act, whether or not the Reservation still exists.

Under Section 35 of the Mineral Lands Leasing Act, as amended (30 U.S.C. 191), "[a]ll money received from sales, bonuses, royalties[,] including interest charges collected under the Federal Oil and Gas Royalty Management Act of 1982 [30 U.S.C. 1701 *et seq.*], and rentals of the public lands under the provisions of this chapter * * * shall be paid into the Treasury of the United States." Section 35 further provides that 50% of such revenues "shall be paid by the Secretary of the Treasury * * * to the State," which must use those funds for planning, construction and maintenance of public facilities, and public services, with priority given to localities that experience the greatest impact from federal leasing activities. 30 U.S.C. 191. There is no exception in this revenue-sharing provision for money received from the leasing of those public lands that happen to be located in the boundaries of an Indian reservation.

Indeed, the absence of any such exception is underscored by the Federal Oil and Gas Royalty Management Act of 1982, which is referred to in 30 U.S.C. 191, quoted above. That Act establishes procedures to ensure, inter alia, "the prompt and proper collection and disbursement of oil and gas revenues owed to the United States and Indian lessors and those inuring to the benefit of the States." 30 U.S.C. 1701(b)(3). Under the revenue-sharing scheme of Section 35 of the Mineral Lands Leasing Act, discussed above, revenues "inuring to the benefit of the States" are those derived from lands *other* than those for which there would be "Indian lessors." Because the United States owns outright the public lands within the boundaries of the original Uncompahgre Reservation, and therefore is the lessor of them, there is no "Indian lessor" of these lands.

Moreover, the 1982 Act expressly distinguishes between "Federal land," which is broadly defined to mean "all land and interests in land owned by the United States

which are subject to the mineral leasing laws," and "Indian lands," which are defined to mean "any * * * interest in lands of an Indian tribe or an Indian allottee held in trust by the United States or which is subject to Federal restriction against alienation" (30 U.S.C. 1702(1) and (3)). The public lands within the boundaries of the original Uncompahgre Reservation are not "lands of an Indian tribe * * * held in trust by the United States"; they are, rather, "land[s] * * * owned by the United States," and therefore "Federal lands" for purposes of the 1982 Act. Compare 43 U.S.C. 1702(e), discussed in U.S. Amicus Br. 21. Congress confirmed in the 1982 Act that the lands in which the Tribe has a revenue interest are only those to which it might claim some equitable interest, not "Federal lands," which are "owned" by the United States. Thus, the 1982 Act recognizes that the revenues from the leasing of the latter inure to the benefit of the States, because it gives the States certain rights with respect to information concerning, and the collection of revenue from, the leasing of "Federal lands." By contrast, a tribe's rights under the 1982 Act extend only to information regarding revenues derived from the leasing of "Indian lands," which, as noted above, include only those in which Indians have an *ownership* interest. 30 U.S.C. 1732-1736.

There accordingly is nothing in the Mineral Lands Leasing Act that would deprive the State of its right to receive 50% of the revenues of the Federal Government's mineral leasing of the public lands at issue in this case merely because they are located within the boundaries of what the Tenth Circuit found to be the still-existing Uncompahgre Indian Reservation.

2. Petitioners in fact do not suggest that there is any basis in the Mineral Lands Leasing Act for the Tribe's urging of an "Indian reservation" exception that would deprive the State of its share of revenues under that Act and require that all such revenues be paid to the Tribe. Petitioners instead cite the Tribe's previous reli-

ance on 25 U.S.C. 398b, which states that "[t]he proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order [Indian] reservations * * * shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation * * * was created * * * ." See Pet. Supp. Br. 12-13. However, this provision, which was enacted as Section 2 of the Act of March 3, 1927, ch. 299, 44 Stat. 1347, has no relevance here.

a. The 1927 Act—which in any event was superseded by the Indian Mineral Leasing Act of 1938 (25 U.S.C. 396a *et seq.*) as regards leases entered into after that date (see *Montana* v. *Blackfeet Tribe*, No. 83-2161 (June 3, 1985), slip op. 4)—applied only to the leasing of those lands within the boundaries of an Executive order Indian reservation that were actually held for the tribe's benefit. This is evident from Section 1 of the 1927 Act, 25 U.S.C. 398a, which authorizes oil and gas leasing of "[u]nallotted lands" within a reservation created by Executive order "for Indian purposes." The term "unallotted lands" refers to lands still held for "Indian purposes"—*i.e.*, held in trust for the benefit of the tribe. That term does not encompass lands within an Indian reservation, such as those within the original Uncompahgre Reservation at issue in this case, that have been restored to full and unencumbered *public* ownership. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 151 (1982) (referring to lands covered by the 1927 Act as "Indian lands"). The Tribe has no remaining equitable interest in such lands, and it accordingly has no claim to receive any revenue from the leasing of them. Cf. 54 Interior Dec. 559, 560 (1934).

It is significant in this regard that Section 1 of the 1927 Act (44 Stat. 1347) required the consent of the tribe concerned for the leasing of any lands to which that Act applied. See 25 U.S.C. 398a, incorporating 25 U.S.C. 398. Congress surely did not intend to impose a precondition of tribal consent on the leasing of public lands, in

which the tribe had no interest. The 1938 Indian leasing statute, which since 1938 has governed the mineral leasing of all "unallotted lands" on an Indian reservation (see *Montana* v. *Blackfeet Tribe*, *supra*), likewise requires the consent of the tribe for the leasing of all lands to which it applies. 25 U.S.C. 396b. It follows that those Indian leasing statutes—including provisions for the tribe to receive the royalties and other revenues—do not apply to lands that have been restored to public ownership.

The legislative history of the 1938 Act further supports this conclusion. As the Court observed in *Montana* v. *Blackfeet Tribe*, the 1938 Act was intended to apply to " 'tribal lands' " and to ensure that Indians receive " 'the greatest return from their property' " (slip op. 7 n.5, quoting S. Rep. 985, 75th Cong., 1st Sess. 2 (1937), and H.R. Rep. 1872, 75th Cong., 3d Sess. 2 (1938)).[1] The lands within the boundaries of the original Uncompahgre Reservation at issue here are public lands, not "tribal lands" that are the "property" of the Uncompahgre Indians. Those lands therefore are not governed by the 1938 Act or its 1927 predecessor, upon which petitioners rely.

b. The absence of any basis for a claim by the Ute Tribe to the revenues from the leasing of public lands within the boundaries of the original Uncompahgre Reservation is especially clear. ~~And~~ As we have pointed out in our amicus brief (at 2, 18-19), the Uncompahgres were not even to be compensated for the lands that were opened to settlement pursuant to the 1897 Act (30 Stat. 62), because the Uncompahgre Reservation was regarded as only a temporary reservation pending the making of individual allotments. This important fact led us to oppose the Ute Tribe's motion to intervene in *Andrus* v.

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[1] See also *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195, 199 (1985) (the 1938 Act applies to leasing of "tribal lands"); *id.* at 200 (emphasis added) (the tribe "agrees to sell the right to the use of *its lands* for mineral production").

Utah, even if, contrary to our submission therein (as here), the Uncompahgre Reservation was not disestablished by the 1897 Act. The Tribe argued in *Andrus* v. *Utah* that if the Uncompahgre Reservation still existed, the State was barred from making school indemnity selections within the boundaries of that Reservation, by virtue of the provisions in the general indemnity selection statutes and Section 6 of the Utah Enabling Act forbidding the selection of lands "embraced in Indian * * * Reservations." 43 U.S.C. 851-852; 28 Stat. 109. The government responded, however, that these statutory prohibitions do not apply "to reservation acreage which has been unconditionally opened for entry under the general land laws, without any restriction or obligation on the part of the government to pay over or apply the proceeds of sale to the benefit of the Tribe." See Memorandum for the Peititoners in Response to Tribe's Motion to Intervene at 6, *Andrus* v. *Utah*, *supra*. That also is the basis for the submission in our amicus brief in the instant case (at 20-21) that the Indian reservation exception in the Taylor Grazing Act does not apply to *public* lands within the boundaries of an Indian reservation, and that the rights of Taylor Grazing Act permittees in the area therefore are not affected by the Tenth Circuit's holding that the Uncompahgre Reservation continues to exist.[2]

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[2] The 1948 Act by which Congress added the Hill Creek Extension to the Uintah and Ouray Reservation (Act of Mar. 11, 1948, ch. 108, 62 Stat. 72 *et seq.*) confirms that the Tribe has no interest in mineral leasing within the boundaries of the original Uncompahgre Reservation except on lands that were restored to tribal ownership by the 1948 Act. Thus, even with respect to lands within the Hill Creek Extension, the Act provides that "[v]alid rights and claims of individuals initiated under the public-land laws or otherwise involving any lands within said boundary shall not be affected by this Act" (62 Stat. 77)—a provision that preserves any claims, including those for oil shale (see *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980)), under the mining laws—and that rights owned by

3. For the foregoing reasons, we disagree with petitioners' submission that the allocation of "hundreds of millions of dollars" of oil and gas royalties and other revenues may turn on whether the Uncompahgre Reservation was disestablished by the 1897 Act. In any event, this new argument by petitioners applies only to the Uncompahgre Reservation, not the Uintah Reservation.[3] We have suggested in our amicus brief (at 22) that as an alternative to denying the certiorari petition, the Court may wish to vacate the judgment below and remand the case to the court of appeals for further consideration of the status of the Uncompahgre Reservation in light of the views expressed by the United States, which were not previously presented to the court of appeals.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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the United States in fissionable minerals and in certain other lands withdrawn for oil shale purposes are specifically withheld from the transfer to tribal ownership of lands within the Extension (62 Stat. 77). The necessary premise of these provisions must be that, but for the 1948 Act, the United States, not the Tribe, retained complete ownership of *all* mineral rights in the original Uncompahgre Reservation.

[3] There apparently are no unreserved public lands on the Uintah Reservation. Mineral leasing in the National Forest portion of that Reservation clearly is governed by the Mineral Lands Leasing Act of 1920. See 30 U.S.C. 191; U.S. Amicus Br. 17.

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No. 85-1821

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE STATES OF SOUTH DAKOTA, ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the language of the Uncompahgre Act of August 15, 1894, implemented by the Act of June 7, 1897, and the Uintah Act of May 27, 1902, as amended, providing that the unallotted lands of these original Indian reservations shall be restored to the public domain, constituted clear language of disestablishment, as this Court has recognized, or whether the original reservation boundaries continue to exist because this Court's decision in *Solem v. Bartlett* changed the effect of such language, as the *en banc* majority of the court below held.

2. Whether the original Uncompahgre Reservation was disestablished in light of the express statutory language and the facts that the United States has not treated the disputed area as a reservation since 1897, that in 1965 the Tribe recovered damages from the United States on the basis that the Uncompahgre Reservation no longer existed, and that the population and land use in the disputed area are more than ninety percent non-Indian.

3. Whether the original Uintah Reservation was disestablished in light of the express statutory language and the facts that the United States did not administer the disputed area as a reservation for more than sixty years after the date of opening, that contemporaneous Presidential, Congressional and administrative treatment of the area showed that it was no longer considered a reservation, that more than half of the original reservation was made into a national forest and that the population and land use in the remaining area are more than ninety percent non-Indian.

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BRIEF FOR THE STATES OF SOUTH DAKOTA, ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE STATES OF SOUTH DAKOTA ET AL.

This case presents an issue of substantial importance to the State of South Dakota and other states with present and former Indian reservations. The United States Court of Appeals for the Tenth Circuit has concluded that Acts of Congress with operative language restoring Indian reservations to the public

domain were not intended to disestablish those reservations. Pet. App. 1a-62a. The Court of Appeals premised its decision on a misreading of *Solem v. Bartlett*, 465 U.S 463 (1984), and plaintiffs in New Mexico and elsewhere are already specifically relying on this misreading to resurrect boundaries of Indian reservations long deemed disestablished.

In recent years South Dakota participated in *Solem* and two similar cases before this Court, *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The decision of the Court of Appeals conflicts in principle with all three of these cases. The *Amici Curiae* unequivocally support the petition for a writ of certiorari.

DISCUSSION

1. The *en banc* majority's rationale, premised on a misconstruction of the significance of "public domain" language, is of substantial concern to *amici*. Heretofore, the equation of public domain language with reservation disestablishment has been a universally accepted principle of federal Indian law. Throughout the Western States, Congress and the Executive Branch routinely utilized such terminology in the language and legislative history of Acts such as presented here. In South Dakota, for example, millions of acres of Indian reservations were "restored to the public domain".[1] Until the *en banc* majority's decision, no court seriously questioned that such operative language was not precisely suited to disestablishment. *Seymour v. Superintendent*, 368 U.S. 351, 354-55

[1] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 (1977). *See, generally, Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942).

(1962); *Mattz v. Arnett*, 412 U.S. 481, 504 n. 22 (1973). See, generally, *United States v. Pelican*, 232 U.S. 442 (1914).

Indeed, in 1975, when this Court framed the issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), it did so in terms of an underlying inquiry for "public domain" indicia:

> These two cases, consolidated for decision, raise the single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and the Sisseton and Wahpeton bands of Sioux Indians, was terminated *and returned to the public domain, by the Act of March 3, 1891*. *DeCoteau, supra* at 426-427. (Emphasis added).

Since the legislative history in *DeCoteau* indicated that Congress intended to restore the reservation to the public domain, the issue was decisively resolved. *See DeCoteau*, 420 U.S. at 441, where, after noting that the intended effect of the Act was made clear by the sponsors, this Court set forth in the text of the opinion two "public domain" excerpts from the Congressional Record ("surrender of a large portion of their reservation to the public domain"; "all this land is opened by this bill to settlement as a part of the public domain"). *Id.* at 439-441. In concluding, the Court reiterated this basic understanding:

> That the lands ceded in the other agreements were *returned to the public domain*, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation

> stated repeatedly that the ratified agreements would *return the ceded lands to the 'public domain.'* See *supra*, at 440-441. Cf. *Mattz v. Arnett*, 412 U.S. 481, at 504 n. 22.

DeCoteau, 420 U.S. at 446. (Emphasis added.)

Two years later, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), this aspect of the issue was treated essentially the same. *Rosebud*, 430 U.S. at 589, 600, 600 n. 21. Even the *Rosebud* dissent expressly acknowledged that "'restored to the public domain'" was "'clear language of express termination'". *Rosebud*, 430 U.S. at 618 (Marshall, J., dissenting).

In the instant case, the district court and the panel below premised their initial decisions on this fundamental understanding (Pet. App. 69a, 76a, 78a, 79a, 83a, 84a), as the *en banc* majority acknowledged (Pet. App. 17a-18a). Subsequently, however, this Court decided *Solem v. Bartlett*, 465 U.S. 463 (1984). The *en banc* majority's conclusion that *Solem* "dictated" a different result with respect to the crux of this case, the significance of operative public domain terminology, is explicitly stated:

> The original expression 'return to the public domain' does not reliably establish the clear and unequivocal evidence of Congress's intent to change boundaries. *Solem*, 104 S.Ct. at 1166 [majority opinion].
>
> Our *conclusion* is that the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish [majority opinion].

> Although the district court and the panel viewed this as language of cession, I believe that *Solem dictates* a different result [concurring opinion].
>
> Prior to *Solem*, 'public domain' language could have been construed as more conclusive evidence of disestablishment; following *Solem*, the term must be viewed as *ambiguous* in portent. . . [concurring opinion].
>
> Ultimately, I interpret *Solem* to *hold* that 'public domain' language standing alone is *insufficient* to support a finding of explicit congressional intent to disestablish [concurring opinion].

Pet. App. at 11a-12a, 17a-18a. (Emphasis added). *Solem* clearly did not dictate this principle. *See* Pet. at 14-17, 19-21. Although the *en banc* majority addressed other points, some of which are noted below, it is evident that the ultimate conclusion centered around this fundamental misconstruction.

As a result, this Court is now presented with a conflict of even greater magnitude than the related issue presented in *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, ___ U.S. ___, 105 S.Ct. 3420 (1985):

> Because the Court of Appeals' decision appeared to *conflict in principle* with the decision of the Eighth Circuit in *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (*per curiam*), *cert. denied*, 449 U.S. 905, 101 S.Ct. 279, 66 L.Ed.2d 136 (1980), *we granted certiorari*, 469 U.S. ___, 105 S.Ct. 242, 83 L.Ed.2d 180. We now reverse.

Oregon, 105 S.Ct. at 3427 (Emphasis added). The importance of the principle resolved in *Oregon* (*i.e.* reservation rights remaining after cessions of Indian reservations) highlights the importance of the principle at issue here (reservation rights remaining after restoration of Indian reservations to public domain). Moreover, with respect to operative public domain language, the decision of the *en banc* majority unequivocally "conflicts in principle" with not just one circuit but all circuits—in fact, it appears to "conflict in principle" with all reported decisions that have addressed, indirectly or directly, the effect of a Congressional act or Executive order whose operative language restored an Indian reservation to the public domain. Pet. at 13-21. This controlling aspect of the opinion below, which influenced the *en banc* majority's view of other pertinent factors, thus clearly warrants review.

2. While *amici* unequivocally support and share the concern of Petitioners that the second largest Indian reservation in the United States (4,000,000 acres) has been resurrected in Utah as a result of this misconstruction, the sweeping mischaracterization of *Solem* by the *en banc* majority undermines this area of federal Indian law and is thus of even broader consequence.

The recent New Mexico cases, discussed by Petitioners at 12, where the plaintiffs specifically rely on this misreading of *Solem* by the *en banc* majority, will not be isolated examples. Nor is the list of twenty-nine public domain areas in other states cited by Petitioners, extensive as it is, all inclusive. Pet. at

11-12. Kappler identifies nine additional Orders in the short period of 1876 to 1883.[2]

Compounding the *en banc* majority's mischaracterization of *Solem* and making even more certain the predictability of additional litigation in these areas is the evaluation in a recent Comment in the *American Indian Law Review* that was awarded first place in the Indian Law Writing Competition at Harvard University:[3] The author there concludes, as did the *en banc* majority, that after *Solem* "[t]he category of statutory language terminating a reservation has been reduced by *eliminating* 'public domain' . . . the argument, *approved* in *Solem v. Bartlett*, that the pubic domain language in surplus land acts carried little meaning. . . .", *id.* at 69-70, 73 (Emphasis added). In context, the remarks in *Solem* obviously were not intended to support such a conclusion.[4] Nevertheless,

---

[2] *See, e.g.* Exec. Order of October 30, 1876 (I Kappler 814) (White Mountain); Exec. Order of May 3, 1877 (I Kappler 821) (Mission Res.); Exec. Order of February 5, 1883 (I Kappler 823) (Mission Res.); Exec. Order of August 19, 1874 (I Kappler 856) (Blackfeet); Exec. Order of March 29, 1884 (I Kappler 885) (Turtle Mountain); Exec. Order of January 28, 1876 (I Kappler 889) (Malheur Res.); Exec. Order of September 13, 1882 (I Kappler 889-90) (Malheur Res.); Exec. Order of May 21, 1883 (I Kappler 890) (Malheur Res.); and Exec. Order of February 23, 1883 (I Kappler 904-05) (Chief Moses).

[3] Comment, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 A.I.L.Rev. 57 (1986).

[4] In contrast to the operative public domain language in the Utah Acts and Proclamations, the reference to public domain in *Solem* was an isolated one. Public domain terminology did not appear in the operative language of the *Solem* Act, and although the reference itself was deemed supportive of disestablishment,

that such a conclusion could be erroneously attributed to *Solem* shows how unsettling and disruptive the *en banc* majority's decision promises to be.

Authoritative review by this Court at this time will stem the tide of writs for *habeas corpus* and other actions, in precisely the same manner as in *DeCoteau*, when this Court acted decisively and reversed the decision of the Court of Appeals for the Eighth Circuit for a similarly fundamental misconstruction. *DeCoteau*, 420 U.S. at 430, 447. In the absence of such review, an inordinate expenditure of time, effort and resources will continue to be wasted on an issue that had been settled for decades.

3. *Solem.* If *Solem* can fairly be faulted with respect to a lack of clarity on the public domain issue, as has been suggested, then this Court's attention to other aspects of *Solem* at least merits additional consideration. Apart from the fact that South Dakota's position before this Court in *Solem* makes clear its view of the holding in *Solem*, the guidance of *Solem* in other respects leaves more to be desired. Insofar as the "fairly clean analytical structure" that *Solem* counsels, (465 U.S. at 470) even the *American Indian Law Review* Comment, *supra*, recognizes: "a contorted body of doctrine"—"two interpretations of the history of the allotment policy as applied to the surplus lands acts"—"two historical interpretations of what the allotment process meant for the reservation system: one, that it ended the reservations, and another, that it did not."—"The interpretations of sur-

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Solem noted that it was "hardly dispositive" when "balanced against" other persuasive evidence of continuing reservation status. *Solem*, 465 U.S. at 475. *See* the discussion in Pet. at 14-17, 19-21.

pius land acts is confused"—"The present case law, discussed below, is now so confused." *Id.* at 61, 62, 69.

In light of this lack of clarity, it is not difficult to understand the widely divergent views and marked disagreement below—or elsewhere for that matter. It is left to this Court to settle conclusively what *Solem* means and to state whether the Court intended to contradict more than a half a century of jurisprudence regarding the significance of public domain language.

a. Part of the apparent confusion may stem from a study that figured prominently in the *Solem* opinion. *Solem*, 465 U.S. at 466 n. 5, 477 n. 21, 479 nn. 22 & 23, 480 nn. 24 & 25. This study dealt only with the Cheyenne River Reservation. Subsequent to *Solem*, it was discovered that a prior comprehensive thesis of the allottment era (1880-1920) by the same author (1) significantly contradicts the author's *Solem* study and (2) expressly recognizes that the Utah Uintah Act and others "followed the model" of the 1904 *Rosebud* Act—the same Act that the *Rosebud* Court held reflected the baseline purpose of disestablishment in the *Rosebud* legislation.[5]

b. Although *Rosebud* effectively and correctly rejected the *Ash Sheep*[6] and related lingering-beneficial-interest argument, as "logically separate from the question of disestablishment", (*Rosebud*, 430 U.S. at 601, n. 23) and although *Solem* cites *Rosebud* with

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[5] F. Hoxie, *Beyond Savagery: The Campaign To Assimilate The American Indians, 1880-1920* at 390 (Univ. Microfilms 1977).

[6] *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920).

approval repeatedly, *Solem* also cites *Ash Sheep* with approval and again lends support throughout to the *Ash Sheep* and related lingering-beneficial-interest argument. *Solem*, 465 U.S. at 468. While *Solem* recognizes that it is now "settled law that some surplus land acts diminished reservations...and other surplus land acts did not. . .", (*Solem*, 465 U.S. at 469) it is doubtful that this Court really intended for a holding in a particular case to actually depend upon which analysis of the same argument a particular court might find persuasive. *Rosebud*, 430 U.S. at 601, n. 23; *Solem*, 465 U.S. at 469.

4. The *en banc* majority goes beyond *Solem* in several additional respects. Although not at issue, the court below initially describes this case as one involving lands and title to lands:

> . . .this writer agreed. . .who generally ruled that the Uintah Reservation *and its lands remained the property* of the tribes that are involved. As to the question of whether the acts dealing with the Uintah Forest and the Uncompahgre Reservation mean that *the Indians lost title to these lands*, the view of this writer is contrary to the view of the trial court.

Pet. App. 3a. (Emphasis added.) But the parties in this litigation were not contesting the title to the lands involved. Secondly, while this Court has held that opening land to settlement was not necessarily inconsistent with continuing reservation status, the

en banc majority initially "assumes the very question to be decided"[7]:

> Actually the intent was to open the reservation to non Indian settlers and this *couldn't* [disestablish the reservation].

Pet. App. at 4a. (Emphasis added.) But see, *DeCoteau* and *Rosebud*.

Moreover, while *Solem* did note that there are "limitations as to how far we will go to decipher congress's intent in any particular surplus land act" this Court has consistently and meticulously, on both the evidentiary and pragmatic level, at least considered all arguments. The court below categorically rejected this approach:

> No particular significance can be given to these articles since they were written from the white settlers' point of view.

Pet. App. 13a. *See DeCoteau*, 420 U.S. at 431, 432, where documentation similar to that rejected by the court below is set forth at length in the text of the *DeCoteau* opinion.

5. In other instances, the *en banc* majority simply ignores *Solem*. No particular significance is paid to the fact that the area in dispute encompasses more non-Indian land than any "Indian reservation" in the United States and is populated by over 90% non-Indians. Pet. at 9-10. *DeCoteau* and *Rosebud* discuss justifiable expectations at length, and *Solem* specifically notes that such pragmatic factors, not present

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[7] *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984)

in *Solem*, were still entitled to considerable weight and consideration. *Solem*, 465 U.S. at 471. The *en banc* majority does not even discuss this aspect of *Solem*. In this instance, the "*Solem* standards" were ignored.

6. The *en banc* majority also ignores the fact that the United States has consistently taken the position that the Utah Uncompahgre Reservation ceased to exist because it was restored to the public domain. After nearly a century of reliance upon express representations of the United States, by the people, the courts, the state government and the Congress, the *en banc* majority should have at least discussed the merits of this position. This is especially so in light of the fact that the United States does not lightly conclude a reservation has been disestablished. In *Seymour*, *Mattz*, *Rosebud*, *DeCoteau* and *Solem* the United States argued against reservation disestablishment.

7. The *en banc* majority does not, however, neglect to mention that the Justice Department supported its conclusion with respect to the Uintah Reservation when it appeared for the United States as *amicus curiae*. However, the arguments of the United States have not been consistent with reference to the Act of February 8, 1887, 24 Stat. 388, (General Allotment Act). In *Seymour* and *Mattz* and until *DeCoteau*, the focal point of the position of the United States was the General Allotment Act of 1887. Because there were no major subsequent adjustments in federal Indian policy until 1934, the United States reasoned, logically, that any Congressional constancy in federal Indian policy *vis-a-vis* the surplus land statutes, must necessarily be tied to the General Allotment Act. The United States therefore concluded that surplus land

statutes subsequent to the enactment of the General Allotment Act were *not* intended by Congress to disestablish reservations. After this Court held in *DeCoteau* that Congress utilized the General Allotment Act in surplus land statutes to continue to disestablish Indian reservations after 1887, the United States abandoned its argument relying on Congressional constancy in federal Indian policy. In its stead, the United States substituted a case by case analysis based upon more subtle indicia of Congressional intent. According to this new argument of the United States, such an analysis must necessarily reflect that Congressional intent vacillated from time to time and from act to act. At any one time Congress might utilize a standard format intending to disestablish one reservation and the next time utilize the same or similar format not intending the same result. The concept of such vacillating Congressional intent is made more elusive by the fact that no Congressional enactment between 1887 and 1934 has yet surfaced to establish when such a fundamental shift in Congressional policy occurred. (Not only is the historical record *everywhere* silent with respect to any contemporary documentation to support such an argument, but it also affirmatively refutes the existence of such an ill conceived Congressional plan). Nevertheless, the United States maintains this is what Congress intended. Fortunately for Utah, the position of the United States with respect to the Uncompahgre Reservation does not hinge upon such subtleties.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 85-1821

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,
Petitioners,

v.

UTE INDIAN TRIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SANTA FE MINING, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

Santa Fe Mining, Inc. ("Santa Fe") hereby respectfully moves for leave to file the enclosed Brief *Amicus Curiae* in support of the Petition for Writ of Certiorari in this case. The consent of attorneys for the Petitioners has been obtained. The consent of the attorney for the Respondent was requested but refused. As grounds for this Motion, Santa Fe states that it has an interest in the case because:

1. Santa Fe owns substantial real property interests located in the State of New Mexico within an area temporarily set aside in 1907 and 1908 as an extension of the Navajo Indian Reservation and subsequently, in 1908 and 1911, "restored to the public domain."

2. Santa Fe is named as a defendant and representative of an asserted class of non-Indian landowner defendants in *Navajo Tribe of Indians v. State of New Mexico*, United States District Court No. CIV 82-1148JB (D.N.M.), *on appeal*, Tenth Circuit Court of Appeals Nos. 84-1418 and 84-1764, where the Navajo Tribe of Indians seeks to assert, in addition to claims to title, civil and criminal jurisdiction over approximately 1.9 million acres of land within New Mexico that were ordered "restored to the public domain" by Congress and subsequent actions of Executive officials.

3. Like the Petitioners, Santa Fe was unaware until recently of any contention by an Indian tribe that its lands remained part of an Indian reservation.

4. If the *en banc* decision of the United States Court of Appeals for the Tenth Circuit in this case stands, it may impair Santa Fe's ability to protect the present applicability of state, rather than federal or tribal, law, regulation, and, possibly, taxation to its activities and property interests in the approximately 1.9 million acre area claimed by the Navajo Tribe to be part of its Reservation.

5. For these reasons, this Motion for Leave to File a Brief *Amicus Curiae* should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether an allotment era statute providing that Indian reservation lands be "restored to the public domain," in light of recognized, contemporaneous understandings of that phrase and of related public land law principles, clearly expresses a Congressional intention to disestablish the affected reservation.

2. Whether a statute providing that Indian reservation lands be "restored to the public domain," that terminated all tribal interest in the affected lands, and that legislative history, surrounding circumstances, and subsequent Congressional and Executive jurisdictional treatment reflect was intended to terminate all reservation attributes of the affected lands, must be interpreted as preserving reservation status solely because Congress did not express a further and separate intention to disestablish reservation boundaries.

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IN THE

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No. 85-1821

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICUS CURIAE* OF SANTA FE MINING, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI

The *amicus curiae*, Santa Fe Mining, Inc., respectfully prays that a Writ of Certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 17, 1985, and reported at 773 F.2d 1087.

OPINION BELOW AND JURISDICTION

The opinion of the Court of Appeals and the grounds underlying this Court's jurisdiction are described adequately in the Petition for Writ of Certiorari of the Petitioners, State of Utah, Duchesne County, Utah, Uintah County, Utah, Roosevelt City and Duchesne City,

Utah (collectively referred to as "Petitioners" or "Utah"), filed May 5, 1986.

INTEREST OF THE *AMICUS CURIAE*

Santa Fe Mining, Inc. ("Santa Fe"), a Kansas corporation, owns substantial real property interests located within an area in northwestern New Mexico described in Executive Order 709 (November 9, 1907) (Roosevelt, T.), reproduced in the Appendix to this Brief Amicus Curiae ("S.F. App.") 1a, as amended by Executive Order 744 (January 28, 1908) (Roosevelt, T.). In New Mexico, Executive Orders 709 and 744 withdrew from sale and settlement lands lying to the east and south of the previously existing Navajo Reservation, subject to "any existing valid rights," as an addition to the Navajo Reservation. The administrative record establishes that the withdrawal would be temporary, lasting only until individual Navajo tribal members residing in the area had received allotments. Following completion of the allotment process and pursuant to the Act of May 29, 1908, § 25, 35 Stat. 444, 457 ("1908 Act"), Executive Orders 1000 (December 30, 1908) (Roosevelt, T.) and 1284 (January 16, 1911) (Taft, W.), "restored [all the unallotted lands within the New Mexico portions of the lands described in Executive Orders 709 and 744] to the public domain." S.F. App. 2a-3a. Since that time, Congress, Executive officials, Santa Fe and, until recently, the Navajo Tribe have not recognized the restored lands as part of the Navajo Reservation.

Relying in part upon the decision below, the Navajo Tribe presently claims that the roughly 1.9 million acres of lands "restored to the public domain" by Executive Orders 1000 and 1284 ("Executive Order 709-744 Area") remain part of the Navajo Reservation. Santa Fe is named as a defendant and representative of an asserted class of non-Indian landowner defendants in *Navajo Tribe of Indians v. State of New Mexico*, United States

District Court No. CIV 82-1148 JB (D.N.M.), *on appeal*, Tenth Circuit Court of Appeals Nos. 84-1418 and 84-1764, *cited in* Petition, 12 n.27. In that case and in other presently pending litigation, the Navajo Tribe seeks to assert, in addition to other claims, a claim to establish that it has civil and criminal jurisdiction over the Executive Order 709-744 Area. Consequently, Santa Fe's lands are subject to claims that appear similar to those presented with respect to the Uncompahgre Reservation in this action.[1]

Like the Petitioners in this case, Santa Fe has considered its properties to lie outside of any Indian reservation. Santa Fe long has understood New Mexico law to define the incidents of its land ownership and its rights and duties with respect to that land, and the State of New Mexico alone to have jurisdiction over its properties. The decision below threatens these long-held expectations.

The decision below, holding that the Uncompahgre Reservation survived passage of the Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38 ("1894 Act"), as implemented by the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 ("1897 Act"), notwithstanding the temporary nature and limited purpose of the original Executive Order reservation and a Congressional intention to restore the lands to public domain status, may affect adversely Santa Fe's interest in the continued jurisdiction of the State of New Mexico over lands also "restored to the public domain."

Should the decision below stand, not only will Utah be confronted with a substantial reservation where none

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[1] This Brief *Amicus Curiae* will address only those portions of the decision below pertaining to the Uncompahgre Reservation. While important distinctions exist between the histories of the Uncompahgre Reservation and the Executive Order 709-744 Area, even greater differences exist between the pertinent histories of the Uintah Reservation and the Executive Order 709-744 Area. Santa Fe, while it joins Petitioner in urging that the decision below respecting the Uintah Reservation be reversed, will not address the propriety of the decision below concerning the Uintah Reservation.

previously was understood to exist, but also the jurisdictional status of significant portions of other states, including New Mexico, would be called into question where neither Congress nor Executive officials intended or recognized continued reservation status. *See* Petition, 11 n. 25 & 26, 12. The resulting jurisdictional uncertainty will prejudice Santa Fe, other landowners, and state and local governments in areas long considered outside of Indian reservation boundaries because Congress or the Executive branch had restored the area to the public domain.

STATUTORY PROVISIONS INVOLVED

Act of June 15, 1880, ch. 223, 21 Stat. 199, *reprinted at* Pet. App. 294a.

Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38, *reprinted at* Pet. App. 311a.

Act of June 7, 1897, 30 Stat. 62, 87, *reprinted at* Pet. App. 313a.

Act of March 11, 1948, 62 Stat. 72, *reprinted at* Pet. App. 351a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING THAT "RESTORED TO THE PUBLIC DOMAIN" BE INTERPRETED AS CONTEMPLATING RESERVATION TERMINATION.

The majority and concurring opinions of the Court of Appeals for the Tenth Circuit improperly construed this Court's decision in *Solem v. Bartlett*, 465 U.S. 463 (1984), to effect a fundamental reversal of this Court's long-standing view that Congress' command that lands be "restored to the public domain," employed in the 1894 Act and carried forward and executed in the 1897 Act, contemplates the termination of any prior "reservation" status. This misapprehension led the court below to conclude erroneously that the phrase "restored to the public domain" is ambiguous and does not constitute express

language of disestablishment. Pet. App. 18a-19a. This Court's decisions governing reservation disestablishment and "Indian country" jurisdiction refute this principle; certiorari should be granted to correct the conflict between the decision below and well-established precedent of this Court.

A. The Decision Below Conflicts with *Solem v. Bartlett* and the Decisions of this Court Interpreting Statutes that Restored Indian Reservation Lands to the Public Domain.

Contrary to the interpretation of the court below,[2] Pet. App. 18a, *Solem v. Bartlett* did not overrule or question this Court's decisions interpreting "restored to the public domain" as contemplating reservation termination.[3] *Solem*, construing a statute merely providing for the sale and disposal for the tribe's benefit of lands within the Cheyenne River Sioux Reservation, neither required nor occasioned reconsideration of the Court's earlier decisions. *Solem* neither interpreted the phrase "restored to the public domain" nor considered a statute that would have that effect. Rather, in two sentences and a single foot-

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[2] The opinions below reflect a failure to grasp the issue presented and its significance. Judge Seymour's concurring opinion reflects a misconception that "public domain," rather than "restored to the public domain," is the operative statutory language requiring interpretation: "Ultimately, I interpret *Solem* to hold that 'public domain' language standing alone is insufficient . . .". Pet. App. 18a. Although Judge Doyle's majority opinion construes the correct phrase, stating "[o]ur conclusion is that the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish . . .", it mistakenly treats the issue presented as concerning "ownership of the land by the tribal group." Pet. App. 11a-12a.

[3] *See, e.g., United States v. Pelican*, 232 U.S. 442, 445-46 (1914); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 330 (1942); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354-55 (1962); *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973); *DeCoteau v. District County Court*, 420 U.S. 425, 426-27, 446 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 & n.5 (1977); *Solem v. Bartlett*, 465 U.S. at 475 (1984).

note, *Solem* described as supportive of diminishment, but not dispositive, certain "isolated phrases," including the term "public domain," only used to describe lands in which tribal members would retain timbering rights. 465 U.S. at 475 & n.17. Justice Marshall's opinion for the *Solem* Court stressed the statutory preservation of significant tribal interests in the lands, reserved interests that markedly distinguish the lands from lands fully restored to the public domain. *Compare id.* at 474-75 *with infra* at 8-9. Moreover, *Solem* does not retreat from earlier decisions, it discusses with approval each of this Court's modern disestablishment cases. 465 U.S. at 469-70 n.10. Consequently, the conclusion of the court below that *Solem* renders the phrase "restored to the public domain" ambiguous conflicts with *Solem*, and certiorari should be granted to resolve that conflict.

The decision below conflicts with this Court's historic interpretation of the phrase "restored to the public domain." [4] From its decision in *United States v. Pelican*, 232 U.S. 442, 445-46 (1914), decided only six years after passage of the 1908 Act that assertedly is applicable to Santa Fe's lands, through its most recent examination of the phrase in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589, 618 (1977), this Court, without dissent, has interpreted "restored to the public domain" as "clear language of express termination." *Mattz*, 412 U.S. at 504 n.22.

In *United States v. Pelican*, 232 U.S. 442, 445-46 (1914), this Court recognized that lands restored to the public domain cannot retain reservation status. *Pelican*

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[4] Recognizing that the 1897 Act employed the phrase "open[ed] for entry under all the land laws of the United States . . .", Pet. App. 313a, Santa Fe reads the District Courts opinion and the Court of Appeals' panel and *en banc* opinions as considering the 1894 Act's directive that Uncompahagre lands be "restored to the public domain" to embody Congressional intentions subsequently carried forward and executed in the analogous provisions of the 1897 Act. *See infra* at 16 n.16.

involved the Colville Reservation, set apart by Executive Order on July 2, 1872, which the Court observed "was a legally constituted reservation . . . [inasmuch as] it had been segregated from the public domain." 232 U.S. at 445. *Pelican* construed the Act of July 1, 1892, ch. 140, 27 Stat. 62, adopted just two years before the 1894 Act in this case, providing that the north half of the Colville Reservation, following the grant of allotments, was to be "vacated and restored to the public domain" and opened to settlement and entry. 232 U.S. at 445-46. Justice Hughes, for a unanimous Court, construed the 1892 Act as having "diminished" the Colville Reservation. 232 U.S. at 449. Since 1914, this Court has embraced the 1892 Act as a clear example of statutory language of express termination. *See Seymour*, 368 U.S. at 354-56; Petition, 14.

Restoration to the public domain again was held to have terminated reservation status in *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), concerning Executive Orders of Presidents Hayes in 1879 and Arthur in 1884 that ordered portions of four earlier Executive Order reservations of the Sioux Tribe "restored to the public domain." *See* 316 U.S. at 322-23, I Kappler 884-85, 899 (1904 ed.). This Court interpreted these Executive Orders as "cancelling or revoking" the Executive Orders establishing them. *Id.* at 330.[4a] Although it addressed whether the Sioux Tribe had a compensable interest in the lands, the Court's unanimous opinion reflects the conclusion that the restoration of lands to the public domain cancels *in toto* the prior reservation: "the executive orders of 1879 and 1884 terminated the reser-

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[4a] The term "vacated," present in the 1892 Act in *Pelican*, did not appear in the Executive Orders construed in *Sioux Tribe*; moreover, *Sioux Tribe* describes the Act of July 1, 1892, at issue in *Pelican* and discussed in *Seymour* and its progeny, as an act "to restore [lands] to the public domain," that was intended to "abolish a portion of the Colville Reservation . . .". 316 U.S. at 328-29.

vation . . .". 316 U.S. at 330.[5] The decision below conflicts with the Court's decisions interpreting the phrase "restored to the public domain" over the past 70 years.

B. The Decision Below Conflicts with Recognized Principles of Public Land Law and Decisions of this Court Requiring Regard for Contemporaneous Understandings in the Interpretation of Statutes.

The Court's decisions interpreting the phrase "restored to the public domain" are founded upon longstanding principles of public land law uniformly understood by this Court, Congress, Executive officials, and people and businesses concerned with the management or disposition of public lands during the period when the 1894 and 1897 Acts were considered and enacted. Two years before passage of the 1894 Act, this Court recognized that, "'[p]ublic land' means such land as is open to sale or disposition under general laws. *All land, to which any claims or rights of others have attached, does not fall within the designation of 'public land'.*" *Bardon v. Northern Pacific Railroad Co.*, 145 U.S. 535, 537 (1982) (emphasis supplied); *see also* I Lindley on *Mines* § 80 at 82 (1897). In *Bardon*, Justice Field contrasted lands "severed from the mass of public lands," to which "no sub-

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[5] The Executive Order reservations in *Sioux Tribe* were intended to serve a limited purpose of suppressing the introduction of liquor. 316 U.S. at 320. The Court quoted a June 27, 1879 letter from the Commissioner of Indian Affairs to the Secretary of the Interior that makes clear the administrative intention that the 1879 and 1884 Executive Orders would divest the area of "Indian country" status, not just affect land title:

> At the time said lands were set apart there was no law providing a punishment for the sale of liquor to Indians "except to Indians in the Indian country," but, by the Act of February 27, 1877, (19 Stat. 244) persons who now engage in liquor traffic with Indians, no matter in what locality, are liat [to penalty and imprisonment], and, therefore, the necessity for so large a reservation . . . does not now exist.

316 U.S. at 322.

strued to embrace," from those "restore[d] . . . to the public domain," which are subject to appropriation as public lands.[6] 145 U.S. at 538. The majority and concurring opinions of the Court of Appeals do not reconcile their interpretations of the phrase "restored to the public domain" with the Court's contemporaneous and clearly related public land law decisions.

Public land law principles specifically pertinent to interpretation of the 1894 and 1897 Acts were described in plain terms by the United States Public Land Commission in reports prepared pursuant to the Acts of March 3, 1879, 20 Stat. 377, 394, and June 16, 1880, 21 Stat. 238, 245. The Public Land Law Commission, composed of the Commissioner of the General Land Office, the Director of the United States Geological Survey, and three civilians appointed by the President, was charged statutorily to study the federal public land system and to make "such recommendations as [it] may deem wise in relation to the best method of disposition of the public lands . . .". 20 Stat. at 394. The Commission's published 1880 report, *The Public Domain*, recognized procedures for designating the various uses of public lands, including a "Procedure in Abolishing an Indian Reservation":

> When [an Executive Order Indian] reservation is no longer required, and the President is so informed by the Secretary of the Interior, an Executive order is issued *restoring the lands to the public domain*, . . . after which the lands are disposed of as other public lands.

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[6] Thus, when Congress "restored [lands] to the public domain" it intended, since it is presumed to understand the law, *Albernaz v. United States*, 450 U.S. 333, 341 (1981), to return those unallotted lands to the "mass of public lands." *See Hastings & Dakota Railroad v. Whitney*, 132 U.S. 357, 360-61 (1889). Thereafter, those lands were "held in trust for all the people," *Causey v. United States*, 240 U.S. 399, 401 (1916), not just the Uncompahgre Band.

United States Public Land Commission, Committee on Codification, *The Public Domain* 243 (U.S.G.P.O. 1880); H. Exec. Doc. 47, Part 4, 46th Cong., 3d Sess. (1881); H.R. Misc. Doc. 45, Part 4, 47th Cong., 2d Sess. 243 (1884). This Court has recognized the Commission's reports as authoritative. *Eastern Band of the Cherokee Indians v. United States*, 117 U.S. 288, 300 (1886). This report, concluding that an Executive Order restoring Executive Order Indian reservation land to the public domain would "abolish" the reservation, is compelling evidence that the decision below conflicts with this Court's requirement that Indian statutes "must be read in light of common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

The treatment of the Executive Order 709-744 Area, in which Santa Fe's lands are located, further reflects this uniform, contemporaneous understanding. Lands that the administrative record reflects were temporarily set aside in 1907 to facilitate granting allotments to individual Navajo Indians were subsequently "restored to the public domain" by the 1908 Act[7] and Executive Orders 1000 and 1284.[8] Approximately a year after Executive Order 1284 had ordered the western lands "restored to

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[7] The 1908 Act provides:

> That whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation [in the area created by the 1907 and 1908 Executive Orders] have been allotted, the surplus lands in such part of the reservation *shall be restored to the public domain and opened to settlement and entry by proclamation of the President.*

Act of May 29, 1908, § 25, 35 Stat. 444, 457, S.F. App. 1a (emphasis supplied).

[8] Executive Orders 1000 and 1284 both ordered that unallotted lands in the Executive Order 709-744 Area be "hereby restored to the public domain." Executive Order 1000 (December 30, 1908) restored unallotted lands in the eastern portion of the Executive Order 709-744 Area, while Executive Order 1284 (January 16, 1911) restored unallotted lands in the western portion. S.F. App. 2a-3a.

the public domain," President Taft issued Executive Order 1483 on February 17, 1912, which returned certain lands within the Executive Order 709-744 Area to Executive Order reservation status to complete a proposed land exchange. *See* S. Doc. No. 64, 72d Cong., 1st Sess. 31 (1932). Significantly, Executive Order 1483 provided that a new reservation was required because the lands to be exchanged had been "eliminated from [the Navajo] . . . reservation by Executive Order [1284] of January 16, 1911 . . .". S.F. App. 3a. The issuance of Executive Order 1483, by the same President who issued Executive Order 1284, demonstrates a clear understanding that lands "restored to the public domain" were thereby eliminated from the reservation.[9] Subsequent treatment of the Executive Order 709-744 Area reinforces that federal officials uniformly understood that lands "restored to the public domain" were stripped of reservation status.[10]

The decision below conflicts with these contemporaneous understandings that the phrase "restored to the public domain" would "abolish" a reservation or "eliminate" lands from it, thus constituting "language evidencing the present and total surrender of all tribal interests" and terminating reservation status. *Solem*, 465 U.S. at 470. Certiorari should be granted to address the conflict

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[9] President Taft's issuance of Executive Order 1483, within one year of Executive Order 1284, bears a striking similarity to action by President Theodore Roosevelt acknowledged by this Court in *Rosebud* as a "contemporaneous statement, by the Nation's Chief Executive, of a perceived disestablishment . . .". 430 U.S. at 602-03.

[10] *See, e.g.*, S. Doc. No. 64, 72d Cong., 1st Sess. 31-34 (1932); Hearings before a Subcommittee of the Senate Committee on Indian Affairs, *Survey of Conditions of the Indians in the United States*, 71st Cong., 3rd Sess. 9592 (1931); H.R. 14658, 72nd Cong., 2d Sess. (1933); S. 5628, 72nd Cong., 2d Sess. (1933); H.R. 6542, 74th Cong., 1st Sess. (1935); S. 2213, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1451, 73rd Cong., 2d Sess. 1-2 (1934); Hearings before a Subcommittee of the Senate Committee on Indian Affairs, *Survey of Conditions of the Indians in the United States*, Part 34, 75th Cong., 1st Sess. 17421 (1936).

between decisions of this Court mandating regard for such "common notions of the day" and the decision below.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT BECAUSE IT FAILS TO CONSTRUE THE UNCOMPAHGRE ACTS IN LIGHT OF SURROUNDING CIRCUMSTANCES AND DISREGARDS CLEAR EXPRESSIONS OF CONGRESSIONAL INTENTION TO DISESTABLISH.

Foregoing the comprehensive inquiry prescribed by the decisions of this Court, the majority and concurring opinions below fashioned a narrow and superficial analysis of reservation disestablishment. The Court of Appeals overturned the District Court's painstaking and thorough analysis of Uncompahgre Reservation history without questioning its conclusions that contemporaneous materials reflect no intention that the Uncompahgre Reservation would survive the 1894 and 1897 Acts. Rather, the Tenth Circuit rested its reversal on the perceived absence of an express statutory statement of intention to terminate reservation boundaries, an intention not stated in any of the surplus land acts construed to have diminished reservations by this Court.[11] Consequently, the court below ignored compelling statutory language, legislative history, circumstances surrounding passage of the relevant statutes, and subsequent history and treatment of the area by Congress and Executive officials.

The court below misunderstood what *Solem* described as the "fairly clean analytical structure" this Court's decisions have delineated for distinguishing acts "that

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[11] The *en banc* majority states, "we conclude there are no express references to boundary changes or disestablishment in the language of the 1894 or 1897 Acts." Pet. App. 14a. The concurring opinion, conceding that there was no indication of a Congressional intention that the reservation would survive, Pet. App. 24a, and that after 1897 the Uncompahgre Band had no continuing interest in the lands, Pet. App. 22a n.7, nonetheless found Congress had not disestablished the reservation because it "never clearly evinced an intention to disestablish the Uncompahgre Reservation boundaries . . .". Pet. App. 26a.

diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Solem*, 465 U.S. at 470; *accord*, *Rosebud*, 430 U.S. at 597. That judgment must be drawn from "the language of the act *and* circumstances underlying its passage." *Solem*, 465 U.S. at 469 (emphasis supplied). "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests . . ." may suffice; however, even if restoration of the reservation lands to the public domain did not divest all tribal interests,

> explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land act . . . unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink . . ., *we have been willing to infer* that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

465 U.S. at 469, 471 (emphasis supplied).[12] *Solem*, therefore, refutes the Court of Appeals' interpretation of it as requiring statutory references to boundary changes or disestablishment. *See* footnote 12, *supra*. Because the District Court's published opinion amply satisfied *Solem*, certiorari should be granted to clarify that no greater showing of intention to disestablish is required.

Solem's provision for a comprehensive review mirrors that required by the Court's earlier decisions. In *Mattz*

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[12] That the court below failed to examine contemporaneous understandings is illustrated by contrasting the Tenth Circuit's conclusion that the 1894 Act was ambiguous with legislative history to the contrary. During debate on the 1897 Act, Senator Vest of Missouri stated, in reference to the 1894 Act: "There never was a plainer statute. Everybody understood it and concluded that that was the end of the whole question." 30 Cong. Rec. 719, 55th Cong., 1st Sess. (April 14, 1897).

v. Arnett, 412 U.S. 481, 505 (1973), the Court recognized that: "A congressional determination to terminate must be expressed on the face of the Act *or* be clear from the surrounding circumstances and legislative history" and may be "reinforced by repeated recognition of the reservation status of land . . . by the Department of the Interior and by Congress." (emphasis supplied); *see also DeCoteau*, 420 U.S. at 444-45; *Rosebud*, 430 U.S. at 597-98. Apparently believing that *Solem* discarded these principles, the decision below "erroneously seizes upon several factors and presents them as apparent absolutes." *Rosebud*, 430 U.S. at 588 n.4. Even if the language of the 1894 and 1897 Acts were insufficient alone, "the notion that . . . express [termination] language in an Act is the *only* method by which congressional action may result in disestablishment is quite inconsistent with" the *Mattz* standard. *Id.* (emphasis in original). The narrow focus of the majority and concurring opinions below cannot be reconciled with these principles.

The limited inquiry of the court below led it to ignore operative statutory language, legislative history, and other surrounding circumstances reflecting a clear and unambiguous intention of Congress to terminate the Uncompahgre Reservation. The Uncompahgre Reservation was established by Executive Order dated January 5, 1882, following statutory ratification of an 1880 Agreement between several bands of the Ute Indian Tribe and the United States. Act of June 15, 1880, ch. 223, 21 Stat. 199, Pet. App. 294a ("1880 Act").[13] The 1880 Agreement provided that the Uncompahgre Band be removed from its earlier reservation in Colorado to "unoccupied

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[13] Thus, the nature of rights created by the 1882 Executive Order reservation is defined by the 1880 Act. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (power to issue an executive order "must stem either from an act of Congress or from the Constitution itself"); *United States v. Midwest Oil Co.*, 236 U.S. 459, 473-74 (1915).

agricultural lands as may be found . . . in the Territory of Utah." 21 Stat. 200, Pet. App. 297a. Section 3 of the 1880 Act directed the Secretary of the Interior to make allotments "in severalty" to individual tribal members. 21 Stat. 203, Pet. App. 305a. And, Section 4 of the 1880 Act portends that the Uncompahgre Band would not reside in a permanent reservation: "[U]pon the completion of said allotments . . . said Indians shall be subject . . . to the laws, both civil and criminal, of the State or Territory in which they may reside, with the right to sue and be sued in the courts thereof. . . . ". 21 Stat. at 204, Pet. App. 306a; *cf. South Carolina v. Catawba Indian Tribe*, No. 84-782, slip op. 6-10 (U.S.S.Ct., June 2, 1986) (statute providing "the laws of the several States shall apply to [members of terminated tribe] in the same manner they apply to other persons or citizens. . ."). This original intention and subsequent Congressional adherence to it led the District Court below to conclude that the Uncompahgre Reservation was intended to be "a temporary reservation," to last only until allotments were granted to individual Uncompahgre Indians. Pet. App. 170a, 181a.

The 1894 Act effected the terms of the 1880 Act by providing that, after allotments were made, the unallotted lands of the Uncompahgre Reservation shall be "restored to the public domain." [14] Pet. App. 311a. The Court of Appeals' holding that the 1894 Act did not embody a "baseline purpose of disestablishment," [15] that was "car-

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[14] The District Court correctly considered the nature and purpose of the Uncompahgre Reservation material to interpreting statutes arguably terminating it, quoting the Commission of Indian Affairs' July 18, 1884 memorandum: "I do not think [the Uncompahgre Reservation] was intended as a permanent reservation, and I presume that whenever the Indians are settled upon their allotments, the reservation as present [sic] existing will be discontinued." *Quoted*, Pet. App. 181a. Referring to the quoted language, Judge Jenkins held that "the 1894 Act was intended to fulfill that purpose, releasing the remaining lands for non-Indian exploitation . . .". *Id.*

[15] Incongruously, the Tenth Circuit construed the Act of May 24, 1888, ch. 310, § 1, 25 Stat. 157 ("1888 Act"), which declared

ried forth and enacted" by passage of the 1897 Act,[16] is untenable. *See Rosebud*, 430 U.S. at 592; Point I, *supra*. The majority and concurring opinions do not challenge conclusions of the District Court that the Ute Tribe "cites no statement by the proponents of the 1897 Act indicating that the Uncompahgre Reservation was intended to survive the opening, and this court has found none," Pet. App. 183a, and that "[t]he record in this case offers no jurisdictional history contrary to the view that the 1882 boundaries were dissolved in 1897." Pet. App. 184a. Even if the decision below were correct that the operative language of the 1894 Act alone did not express an intention to effect disestablishment, surrounding circumstances unequivocally reflect an intention to disestablish. The Tenth Circuit's reversal of Judge Jenkins' concededly "thoughtful" opinion, Pet. App. 24a, without advancing legislative history or surrounding circumstances affirmatively indicating an intention that reservation status would continue, conflicts with the disestablishment decisions of this Court[17] and with the Court's very

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lands described as the Gilsonite Strip in the Uintah Reservation "to be public lands of the United States and restored to the public domain," Pet. App. 309a-10a, as "explicit": "Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip." Pet. App. 24a. As the Petition suggests, this is flatly inconsistent with the holding that "restored to the public domain" in the 1894 Act is ambiguous. *See* Pet. App. 18a.

[16] The *en banc* majority opinion does not question that any intention to disestablish in the 1894 Act was carried forward in the 1897 Act. *See* Pet. App. 8a-14a. The concurring opinion does not reject the District Court opinion on this point, it only states that ambiguity found in the term "public domain" "is only heightened by its subsequent exclusion from the 1897 Act." Pet. App. 18a. In any event, the District Court's conclusion that "the main thrust of the 1897 Act was to mandate the execution of the purposes of the 1894 Act by the Executive Branch," Pet. App. 182a, is well supported. *See* Pet. App. 175a-183a; Petition, 22-25.

[17] The decision below also does not refute the trial court's determination that administrative interpretations reflect a widely-held understanding that the 1894 and 1897 Acts terminated reservation

recent admonition that Indian lands legislation not be given an interpretation "that conflicts with the [statute's] central purpose and philosophy . . . .". *South Carolina v. Catawba Indian Tribe*, slip op. 8-9.

The court below brushed aside the logical inconsistency of its opinion with the Act of March 11, 1948, 62 Stat. 72 ("1948 Act"), which extended the exterior boundaries of the Uintah and Ouray Reservation into an area that fell "largely within the original boundaries of the Uncompahgre Reservation." [18] Pet. App. 186a. The concurring opinion acknowledged that the 1948 Act "seems irreconcilable with continued reservation status . . ."; however, it ignored the clear statement of Congressional intent that no reservation then existed. Pet. App. 25a. The majority opinion fails to recognize the incongruity of Congress' creation of a new reservation within an area that the 1948 Act refers to as "the former Uncompahgre Indian Reservation." 1948 Act § 2, Pet. App. 363a. *See* Pet. App. 13a. The Tenth Circuit's indifference to the clear premise of the 1948 Act that the "former" Uncompahgre Reservation had been terminated conflicts

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status, *see* Pet. App. 190a, disregarding well-established decisions of this Court that require courts to defer to uniform, contemporaneous, and long-standing Interior Department administrative interpretations respecting Indian lands. In *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 105 S. Ct. 2587, 2597-98 (1985), this Court recognized that Executive officials "responsible for administering the statute[s] . . . were far more likely to have had an understanding of the actual intent of Congress than judges who must consider the legal implications of the transaction over half a century after it occurred." The Tenth Circuit's failure to interpret the 1894 and 1897 Acts to give effect to the clear intentions of Congress and consistent understandings of Executive officials should not be condoned. As *DeCoteau* observed, "[Courts] cannot remake history." 420 U.S. at 449.

[18] That Congress intended to extend boundaries by the 1948 Act, and not merely to acquire title to lands, is demonstrated by H.R. Rep. No. 1372, 80th Cong., 2d Sess. 1-2 (1948), where the oCmmittee on Public Lands described the purpose of the legislation to "enlarge" the Uintah Reservation by over 500,000 acres, including "some 31,000 acres of land purchased for Indian use." *Id.* at 2.

with this Court's careful analysis of comparable legislation. *See Rosebud*, 430 U.S. at 604 n. 27; *Seymour*, 368 U.S. at 356.

Finally, the decision below runs counter to decisions of this Court requiring consideration of pertinent federal policies at the time of passage of the 1894 and 1897 Acts. *See Oliphant*, 435 U.S. at 206; *DeCoteau*, 420 U.S. at 431-32. As this Court stated in *Solem*:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.

465 U.S. at 468, *citing Bates v. Clark*, 95 U.S. 204 (1877). Because land title and Indian property interests, and not reservation boundaries, were then considered determinative of jurisdictional issues, a congressional intention to terminate all Indian interests in lands should be interpreted as reflecting a concommittant intention *pro tanto* to diminish the affected reservation.[19] This absence of remaining tribal interests is especially significant where, as here, tribal *civil* jurisdiction over non-Indians is asserted, and not merely the reach of federal criminal laws following "uncoupl[ing] of reservation status from Indian ownership" by the Act of June 25, 1948, ch. 645, 62 Stat. 757, codified at 18 U.S.C. § 1151. *Solem*, 465 U.S. at 468.[20]

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[19] In *Solem*, the Cheyenne River Sioux Tribe retained an interest in the proceeds of lands that the Cheyenne River Act ordered the Secretary to sell and disposed of, 465 U.S. at 473, an interest the Uncompahgre Band undisputedly lacked in lands subject to the 1894 and 1897 Acts, as the concurring opinion below recognized. *See* Pet. App. 21a-22a.

[20] If permitted to stand, the decision below threatens a jurisdictional upheaval broader than that resulting from any previous decision of this Court upholding reservation status. The Ute Tribe here

Bates provided the standard to determine the extent of state and federal jurisdiction when the 1894 and 1897 Acts were passed:

> The simple criterion is, that, as to all the lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

95 U.S. at 208. As this Court noted in *Rosebud*, when "Indian title had been extinguished, . . . the jurisdiction of the State . . . was full and complete." 430 U.S. at 613 n. 47, *quoting Dick v. United States*, 208 U.S. 340, 352 (1908).[21] Thus, resolution of questions of title also

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asserts broad civil authority over non-Indians under its comprehensive Law and Order Code. *See* Petition, 10-11; *compare Seymour*, 368 U.S. at 357-58 (criminal jurisdiction under 18 U.S.C. § 1151); *Mattz*, 412 U.S. at 483 (18 U.S.C. § 1151); *and Solem*, 465 U.S. at 465 & n.2 (18 U.S.C. § 1151) *with* Pet. App. 114a-116a. The decision below does not address the central question of the applicability of tribal law to non-Indians on patented lands within the alleged reservation, notwithstanding that this Court has rested its modern disestablishment decisions concerning patented lands on the provision of 18 U.S.C. § 1151(a), which defines "Indian country", as used in federal *criminal* laws, to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent . . .". *See Seymour*, 368 U.S. at 357-58 & n.15. The holding below, assuming without discussion that tribal law generally is applicable on patented lands within an undiminished reservation, raises a further significant question of federal law.

[21] Tribal *amici curiae* in *Rosebud* advised this Court:

> [A]t the time the *Rosebud* statutes [and the 1894 and 1897 Uncompahgre statutes] were enacted, the 'title theory' was dominant. A Congressman then would have assumed . . . that each parcel ceased to be Indian country upon the extinguishment of Indian ownership. The term "diminished" would mean dimin-

was understood to resolve questions of federal, tribal, or state jurisdiction, absent Congress' express provision that federal or tribal jurisdiction was to be preserved.

Because jurisdiction was understood to follow title when the 1894 and 1897 Acts were passed, Congress' undisputed intention to terminate entirely the Uncompahgre Band's interest in the lands should be construed to reflect a further intention to terminate federal or tribal jurisdiction over those lands. That reservation boundaries were not discussed or expressly terminated, therefore, is neither material nor surprising. Certiorari should be granted to address the conflict between the decision below, holding that reservation status adheres in lands considered restored to the public domain in which no tribal interest is preserved, and the decisions of this Court.

CONCLUSION

For the foregoing reasons, *amicus curiae*, Sante Fe Mining, Inc., prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 4th day of June, 1986.

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ished in ownership, not boundaries, since ownership was then thought to be the significant jurisdictional factor.

Brief of *Amici Curiae* National Congress of American Indians, *et al.* 28, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

APPENDIX

APPENDIX

APPENDIX

Act of May 29, 1908, § 25
35 Stat. 444, 457, III Kappler 356, 370 (1913):

That whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona created by Executive orders of November ninth, nineteen hundred and seven, and January twenty-eighth, nineteen hundred and eight, have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.

Executive Order 709, III Kappler 669 (1913 ed.):

It is hereby ordered that the following-described tract of country in the Territories of Arizona and New Mexico, viz:

Commencing at a point where the east line of the Navajo Indian Reservation, as at present constituted, intersects the north boundary of township 23 north, range 13 west, New Mexico meridian; thence due east to the northeast corner of township 23 north, range 5 east; thence south to the southeast corner of township 17 north, range 5 east, New Mexico meridian; thence west to the first guide meridian; thence south on the said guide meridian to the southeast corner of township 15 north, range 9 west; thence west to the southwest corner of township 15 north, range 14 west; thence north to the northwest corner of township 15 north, range 14 west; thence due west to the boundary line between the Territories of Arizona and New Mexico; thence south on the boundary line between the Territories of Arizona and New Mexico to the northeast corner of township 23 north, range 31 east; thence west to the northwest corner of township 23 north, range 29 east; thence south to the northwest corner of township 21 north, range 29 east;

thence west to the northwest corner of township 21 north, range 29 east; thence west to the northwest corner of township 21 north, range 26 east; thence south to the southeast corner of township 21 north, range 25 east; thence west to the southwest corner of township 21 north, range 22 east; thence due north to the southern boundary of the Navajo Reservation, as at present constituted, be, and the same is hereby, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the present Navajo Reservation: *Provided*, That this withdrawal shall not affect any existing valid rights of any person.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *November 9, 1907.*

Exectuive Order 1000, III Kappler 685 (1913 ed.):

It is hereby ordered that the unallotted lands in Tps. 17, 18, 19, 20, and 21 N., Rs. 5, 6, 7, and 8 W., and Tps. 22 and 23 N., Rs. 6, 7, and 8 W. of the New Mexico principal meridian, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the Navajo Reservation by Executive orders dated November 9, 1907, and January 28, 1908, be, and the same are hereby, restored to the public domain, except the following-described lands, embracing 110 unapproved allotments, namely:

The SW. ¼ of sec. 23, T. 17 N., R. 5 W.; the S. ½ of sec. 35, T. 18 N., R. 5 W.; sec. 23 and the N. ½ of sec. 25, T. 19 N., R. 5 W.; the W. ½ of sec. 5 and the E. ½ of sec. 6, T. 20 N., R. 6 W., unsurveyed; the NW. ¼ of sec. 3; the NE. ¼ of sec. 4, the S. ½ of sec. 5, the N.W. ¼ of sec. 8, sec. 17, the N. ½ of sec. 19, sec. 20, and the SE. ¼ of sec. 31, T. 21 N., R. 6 W.; the W. ½ of sec. 33, the S. ½ of sec. 34, and the W. ½ of sec. 35, T. 22 N., R. 6 W.; the N. ½ of sec. 3, sec. 4, the W. ½ and the SE. ¼ of sec. 7, the SE. ¼ of sec. 8, sec. 9, the W. ½ of sec. 16, secs. 17 and 18, the N. ½ and the SE. ¼

of sec. 19, sec. 20, the W. ½ of sec. 21, the E. ½ of sec. 22, sec. 23, the NW. ¼ of sec. 28, the N. ½ of sec. 29, and the NE. ¼ of sec. 30, T. 20 N., R. 7 W.; the W. ½ of sec. —, the SE. ¼ of sec. 19, the S.W. ¼ of sec. 20, the N. ½ and the SE. ¼ of sec. 24, the E. ½ of sec. 25, the SW. ¼ of sec. 26, the S. ½ of sec. 27, the SE. ¼ of sec. 28, the NW. ¼ of sec. 29, the NE. ¼ of sec. 30, the E. ½ of sec. 33, sec. 34, and the W. ½ of sec. 35, T. 21 N., R. 7 W., and secs. 1 and 12 and the SE. ¼ of sec. 11, T. 21 N., R. 8 W. of the New Mexico principal meridian.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *December 30, 1908.*

Executive Order 1284, III Kappler 686 (1913 ed.):

It is hereby ordered that all lands not allotted to Indians or otherwise reserved within the townships in New Mexico added to the Navajo Reservation by Executive orders of November 9, 1907 and January 28, 1908, lying west of the first guide meridian west, be and the same hereby are restored to the public domain.

WM. H. TAFT.

THE WHITE HOUSE, *January 16, 1911.*

Executive Order 1483, III Kappler 686 (1913 ed.):

It is hereby ordered that the following-described lands in New Mexico, being a part of the lands heretofore set aside as an executive reservation for the Navajo Indians and eliminated from said reservation by Executive order of January 16, 1911, be, and the same are hereby, restored to the status existing before said order of January 16, 1911, the purpose being to admit of the consummation of an exchange under the act of April 21, 1904 (33 Stats. at Large, p. 211), initiated prior to said elimination, viz: All odd-numbered sections in T. 22 N., R. 11

and 12 W., New Mexico principal meridian; and it is further ordered that upon completion of said exchange and after allotment to the Indians, any remaining lands shall be opened to disposition by the Secretary of the Interior in such manner and after such notice as he may prescribe.

WM. H. TAFT.

THE WHITE HOUSE, *February 17, 1912.*